

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

IN RE: KBR, INC., Civil No. RWT-09-md-2083
BURN PIT LITIGATION Greenbelt, Maryland
March 13, 2017
9:00 a.m.

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TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE ROGER W. TITUS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: FRED BAKER, ESQUIRE
JAMES LEDLIE, ESQUIRE
LISA SALZBERG, ESQUIRE
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United States District Court
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Greenbelt, Maryland 20770

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P R O C E E D I N G S

THE COURT: You may proceed, Mr. Matthews.

MR. MATTHEWS: Good morning, Your Honor. Always a pleasure to be back in front of this court --

THE COURT: I bet you're happy you weren't scheduled for tomorrow.

MR. MATTHEWS: Well, I was just going to say I'm looking forward to completing this by no later than rush hour. Maybe sooner than that. Maybe we can all get out of Dodge.

Before we proceed to present KBR's closing argument, we would like to take the opportunity as provided by the court late in the day on Friday to submit our counter-designations to plaintiffs' witnesses. And to that end, Ms. Marianne Kies is going to make that presentation. With the Court's permission, we'll proceed.

THE COURT: You may.

MS. KIES: Good morning, Your Honor.

THE COURT: Good morning.

MS. KIES: On Friday, as Mr. Matthews referenced, plaintiffs' counsel directed this court's attention to and made an argument regarding portions of the deposition testimony of Wes Bennett, James Loehr1, David Palmer and Damon Walsh. And KBR at this time would like to direct the court's attention to key testimony from

1 these witnesses that was referenced in KBR's designations.
2 And in addition, KBR would like to direct the court to
3 testimony from General Kirk Vollmecke whom plaintiffs
4 originally listed as a live witness and KBR was prepared
5 to cross-examine.

6 My presentation is not an exhaustive list with
7 KBR's designations for these witnesses and we have
8 complete transcripts containing all of the designations
9 for the court's convenience which I would be happy to
10 provide.

11 THE COURT: Well, thank you. If you could do
12 that, it will be very helpful.

13 MS. KIES: Beginning with Mr. Loehr1, Mr. Loehr1
14 was the executive director of Rock Island Contracting
15 Center. Mr. Loehr1 confirmed that the military made the
16 jurisdictionally dispositive decisions in this case.

17 First, although plaintiffs suggested that Mr.
18 Loehr1 did not know who decided the method of waste
19 disposal, Mr. Loehr1 did confirm that it was the military.
20 He testified that the military assigned KBR the burn pit
21 mission and he has no knowledge of KBR ever operating any
22 burn pit without authorization. And directing the court's
23 attention in particular to page 148, lines 11 to 14. When
24 asked of any personal knowledge that KBR operated a burn
25 pit in an unauthorized manner, he answered no, I do not.

1 To the contrary, Mr. Loehr1 personally directed
2 KBR to continue to use burn pits as late as 2010. That's
3 KBR Exhibit 59, which this court has previously seen a
4 letter from Mr. Loehr1 to KBR instructing KBR to continue
5 operating the burn pits.

6 The military decided if and when to bring
7 incinerators into theater. When asked whether KBR has the
8 discretion to unilaterally decide to purchase an
9 incinerator and bring it into the theater, he answered no.

10 In fact, another key point of testimony from Mr.
11 Loehr1 explaining the incinerator issue is that military
12 efforts to bring incinerators into theater were delayed
13 because the U.S. government violated federal procurement
14 laws.

15 Finally, with respect to the integration point,
16 plaintiffs themselves quoted Mr. Loehr1's testimony that
17 KBR had to be connected and integrated in with the
18 military so that "all were moving in the same direction."

19 The next witness is Lieutenant Colonel Damon
20 Walsh who was the DCMA commander for northern Iraq.
21 Lieutenant Colonel Walsh testified that DCMA translated,
22 communicated General Sanchez's orders to KBR. He also
23 like Mr. Loehr1 confirmed that the military made the key
24 decisions, including the decision to use burn pits. And
25 we would direct the court's attention to page 12, lines 1

1 to 10 of Lieutenant Colonel walsh's testimony. When asked
2 based on his experience as a DCMA commander, if he had an
3 understanding of whether it was the military or a
4 contractor who decided which method of waste disposal to
5 use, he answered yes. And when asked what is that
6 understanding, he said it is the military's responsibility
7 to decide what the waste disposal method is at all
8 locations.

9 In light of that decision, Lieutenant Colonel
10 walsh explained no additional authorization was necessary
11 for KBR to use burn pits. That's pages 127 and 131.

12 Testimony as to location the military decided as
13 to incinerators, the military decided. When asked to
14 describe the conversations that Lieutenant Colonel walsh
15 personally had regarding incinerators, he explained and
16 again speaking as a DCMA commander, in some cases we
17 approved it and in some cases, we didn't, depending on the
18 circumstances for the individual count. That's at page
19 3725 to 3814.

20 Finally, the military decided which services KBR
21 was to perform and where including when and where KBR
22 provided waste management services.

23 The next witness is General Kirk vollmecke. He
24 was a theater DCMA commander. Like Colonel walsh, he is
25 not aware of KBR offering any burn pit without

1 authorization -- apologies. Like Mr. Loehr¹. He
2 confirmed that the military made the jurisdictionally
3 dispositive decisions, including use, including location,
4 including incinerators.

5 The next witness is David Palmer. Mr. Palmer
6 was a KBR employee. He was a theater contracts manager
7 confirming that the military made the key decisions in
8 this case. The military directed KBR to use burn pits.
9 Like several other witnesses, Mr. Palmer is not aware of
10 any instance where KBR operated a burn pit without
11 authorization.

12 Directing the court's attention to page 111,
13 line 16 to 23, when asked if he is aware of any instance
14 where KBR operated a burn pit without the government's
15 knowledge, he answered no, that absolutely would not
16 happen. With funding streams, funding reporting, quality
17 assurance reporting, that could not have occurred. That
18 was Mr. Palmer's testimony. Location, the military
19 decided. Incinerators, the military decided.

20 Finally, Mr. Wes Bennett, another DCMA employee.
21 He was an administrative contracting officer or ACO. Mr.
22 Bennett explained that as an ACO, he provided feedback to
23 KBR when he believed KBR was not "meeting contractual
24 requirements." He also discussed KBR's close working
25 relationship with the military. In particular, that KBR

1 "provided the services while also using the services while
2 living hand in hand with the military." That's at page
3 108, line 19 to 109, line 3.

4 Finally, like the other witnesses, Mr. Bennett
5 confirmed that the military made the jurisdictionally
6 dispositive decisions. Again, those are use, location.
7 And finally, that the contract itself authorized KBR to
8 use burn pits. And that completes my presentation.

9 THE COURT: All right. Thank you very much.

10 MR. MATTHEWS: Your Honor, one other and final
11 matter before we proceed to the closing presentations. We
12 would like to at this point request that the court
13 formally resolve our motion to strike on the issue of the
14 declarations. I wish to say a word or two about that.

15 We did hear from counsel last week, I believe it
16 was on the second day that plaintiffs have now said they
17 don't believe those declarations are relevant. There was
18 a qualifier about that's because the court must accept the
19 allegations of noncompliance as true. That is not so.
20 There's no factual or legal support for that proposition.
21 They are not one in the same. But the fact is the court
22 concluded that these were not relevant. That is correct.
23 And we think in order to ensure that the record is clear
24 on these issues, that an order should issue that recites
25 that point, that recites that plaintiffs were given the

1 opportunity to make another submission by last Tuesday in
2 an effort -- if they so chose to convince the court that
3 there was relevant and nonhearsay testimony. Plaintiffs
4 did not do so. The record should reflect that. So the
5 record should reflect in fact the court's observation
6 based on the examples that were provided by both parties
7 on this issue that the declarations were pure hearsay. I
8 don't know if this is first or last, but the record should
9 reflect that more than anything else, the 700-plus
10 declarations violated the court's rule on 20 witnesses and
11 the court's admonition that 20 means 20.

12 For all those reasons, Your Honor, we
13 respectfully request that there be some formal resolution
14 of our motion to strike so the record is clear on those
15 points. And we have prepared a revised proposed order.
16 We haven't prepared. We had prepared, but apparently, it
17 got lost on the printing room floor. So we are prepared
18 to submit a revised proposed order.

19 THE COURT: Well, we can print things for you
20 here if you need to have something printed.

21 I made my position I think clear about this when
22 we had the proceedings the week before last with you and
23 Mr. Ledlie. These are declarations that have been filed
24 in the case, but not filed necessarily in support of or in
25 opposition to the motion that's before me except in a

1 footnote on one page of the plaintiffs' opposition. I was
2 shown excerpts from several of these declarations. I
3 expressed skepticism that they were relevant. I also made
4 it clear that some of the information was clearly hearsay.
5 Some of it had -- and the vast bulk of it had nothing to
6 do with any issues before the court in this case.

7 I, therefore, directed counsel for the
8 plaintiffs if they wanted to in fact rely upon any of
9 these declarations, they should give me a list of which
10 declarations they want to rely upon and which paragraphs
11 so I could make a determination whether to do so. They
12 have not done so.

13 And if I recall the statement made at the
14 beginning of this proceeding last week, it was that they
15 are not really relevant. Well, if they're not relevant
16 and they've never given me anything about it, I'm simply
17 not going to consider them. I have given the plaintiffs
18 the opportunity to identify which declarations they want
19 to rely upon and what paragraphs so that I can make a
20 determination. But I'm not going to go on a hunt through
21 page after page after page of declarations, most of which
22 deal with matters not germane to the purely jurisdictional
23 issues before me or the fact issues on the pure
24 jurisdiction questions and in the absence of anything new
25 from the plaintiffs, I'm not going to consider those

1 declarations. Anything that the plaintiffs want to say in
2 response to that?

3 MR. LEDLIE: Yes, Your Honor. The Kerns case
4 governs the fact that the -- the fact that given the
5 procedural posture of the case, Your Honor, the fact that
6 we were not afforded any meaningful discovery as to the
7 violations at the various bases, that at this juncture,
8 Your Honor, you are required to accept the plaintiffs'
9 allegations of violations as true for purposes of
10 resolving the motions before the court today.

11 THE COURT: That doesn't help me on the question
12 about the declarations. That may be your position on how
13 I resolve the jurisdictional question. But I asked you to
14 give me which declarations you wanted me to look at and
15 which matters that were properly before me in a sense that
16 they weren't rank hearsay and properly before me in the
17 sense that they related to something germane to the issues
18 before the court today and you didn't do it.

19 MR. LEDLIE: I understand, Your Honor. I'm
20 responding to counsel's argument that you're not required
21 to accept those allegations as true for the purposes of
22 this hearing. It is legal support for it. I just wanted
23 to direct Your Honor's --

24 THE COURT: Whether there's a breach or not a
25 breach is not germane to the issues before the court

1 today.

2 MR. LEDLIE: That's untrue, Your Honor.

3 THE COURT: well --

4 MR. LEDLIE: The violation of the contract, Your
5 Honor, shows a lack of control. That's been our --

6 THE COURT: well, then you need to tell me which
7 declarations you want me to look at. I've told you that
8 before.

9 MR. LEDLIE: I understand, Your Honor. We
10 understand Your Honor's ruling --

11 THE COURT: And you haven't done it. So if you
12 haven't done what I've asked you to do, I can't look at
13 declarations that have not been identified as to which
14 ones you want me to look at and what portions of them
15 because there's a large number of declarations with
16 hundreds and hundreds of pages that have huge amounts of
17 information that's either hearsay or not relevant to the
18 case. So you need to tell me which ones even under your
19 theory of relevancy as to why you think it's relevant and
20 you haven't done it.

21 MR. LEDLIE: If Your Honor hasn't identified
22 whether you're going to follow the Kerns case or not and
23 accept our allegations as true, if you do, they're
24 completely irrelevant, Your Honor. We agree because we
25 don't need to prove that. But we've stated our position

1 and that's why it's in a footnote that that is the law
2 that controls this case and because we don't believe that
3 they are relevant because you must accept those
4 allegations as true, we understand Your Honor's ruling.

5 MR. MATTHEWS: Your Honor, I don't think this is
6 the proper time. We want to get on to the closing.

7 THE COURT: All right. Well, let's get on with
8 the closing argument and I'll further consider it later.

9 MR. MATTHEWS: Thank you, Your Honor.

10 Your Honor, I'd just like to give you a brief
11 roadmap of how we are going to proceed. We are going to
12 proceed in multiple steps. I think it will be as
13 efficient for the court as we could possibly be. So we've
14 broken it down as follows. We will first address the key
15 legal principles and case law, the precedence underlying
16 these proceedings. And on those issues, Mr. Russell will
17 get up in a minute and make that presentation.

18 After that, we're going to summarize what we
19 consider to be the salient facts that are applicable in
20 these proceedings that speak to ultimately the two
21 threshold issues before the court, the political question
22 and combatant activities. Mr. Chase Johnson will deliver
23 that presentation.

24 We'll then proceed to try to synthesize the law
25 and the facts as they apply to the political question

1 doctrine. I will be making that presentation.

2 we'll do the same, synthesizing the law and the
3 facts for Combatant Activities Preemption. Mr. Russell
4 will return to the podium and make that presentation. And
5 then finally, we'll have a few closing observations to
6 share with the court and Mr. Ben Razi will delivers those
7 comments.

8 With that, Your Honor, may we proceed?

9 THE COURT: You may.

10 MR. MATTHEWS: Thank you.

11 MR. RUSSELL: Good morning, Your Honor. We have
12 a slide presentation that we intend to use today. I've
13 got a copy of my slides for the court as well as a
14 complete copy of all the slides that will be presented to
15 the court. Can I approach?

16 THE COURT: Yes, you may.

17 MR. RUSSELL: Your Honor, at this point the
18 court has received an enormous amount of evidence,
19 extensive briefing, extensive documentary evidence,
20 extensive witness testimony over the last few days. And
21 let me say we very much appreciate the Court's time in
22 allowing both sides to present their evidence on KBR's
23 motion.

24 At the outset today, we wanted to provide just a
25 brief overview of the legal landscape within which KBR's

1 two defenses reside. We recognize the court is familiar
2 with several of these key principles. We recognize that
3 these issues have been briefed extensively. But in light
4 of some of the arguments that were raised by plaintiffs
5 last week in light of some of the questions this court
6 asked, we thought it would be useful not to cover all of
7 the case law in detail, but to point out a few key
8 take-aways and relevant portions from the universe of case
9 law relevant here.

10 So to begin with, I just have one slide on an
11 overview of our two defenses and as we would note, these
12 two defenses, they arise from different constitutional
13 origins and rationales, but they very much are two
14 different ways to the same place and they have different
15 fundamental rationales, but the same central theme as
16 applied in this case.

17 Our first defense is the political question
18 doctrine. As Your Honor is aware, this is a doctrine that
19 arises from the Constitution's separation of powers, the
20 fundamental design of our government. And as applied to a
21 battlefield contractor suit such as these, the primary --
22 a primary purpose of the political question doctrine is to
23 avoid inappropriate judicial scrutiny of sensitive
24 military judgments. And, Your Honor, that's a phrase that
25 you hear quite a bit in the case law. I think you'll hear

1 quite a bit today and it's really at the heart of both of
2 these defenses. This notion that there are sensitive
3 military judgments that are committed and reserved to the
4 political branches of government and to the federal
5 government and I'll turn on that point to our preemption
6 defense, which is rooted in a separate, but equally
7 fundamental concept of our government. Federalism, the
8 supremacy clause of the Constitution. And the notion that
9 under our federalism design, the federal law is the
10 supreme law of the land and insofar as state law would
11 conflict with federal law or federal interests, state law
12 is preempted.

13 And as applied here in the contractor
14 battlefield realm, one of the key goals of the Combatant
15 Activities Preemption defense as set forth in the case law
16 is to avoid state tort law touching, impacting, affecting
17 sensitive military judgments. Again, this is a matter
18 that the courts have made clear that is exclusively
19 reserved at the federal level and the imposition of any
20 non-federal duties in this realm is inherently at odds
21 with these uniquely federal interests.

22 And so we would capture the unifying theme here
23 as both of these fundamental constitutional doctrines are
24 designed to avoid interference with sensitive military
25 judgments which our Constitution tells us, the case law

1 tells us, these are matters that must have a single
2 arbiter, a single boss and that is the executive and
3 political branches as well as the federal government.

4 Turn now quickly to the legal standards
5 applicable to these defenses. As Your Honor is aware,
6 KBR's 12 -- political question doctrine defense arises
7 under Rule 12(b)(1). It is the plaintiffs' burden to
8 establish this court's subject matter jurisdiction. As to
9 our preemption defense, that motion is brought under Rule
10 56. It is black letter law. KBR has the initial burden
11 having brought forth evidence to establish its entitlement
12 to judgment as a matter of law. Of course, that burden
13 shifts to the plaintiffs to show a genuine dispute.

14 And we'd just note again for the court that, of
15 course, we are not moving for summary judgment on the
16 merits. We're not moving for summary judgment on say
17 breach of contract. We are moving for summary judgment as
18 to an affirmative defense, which is separate and apart
19 from the merits and is centered on these notions of
20 control and integration, which Your Honor chartered a
21 course long ago to resolve independent of merits issues.

22 So I want to run through some of the key cases
23 that are cited by the parties. I won't dwell on these I
24 hope any longer than necessary and I will be placing
25 particular emphasis on two cases. The Carmichael case and

1 the Saleh case. But let me just list for the court the
2 key cases that are cited by the parties and then I'll walk
3 through them spending a little more time on some than
4 others.

5 And, Your Honor, I want to note before I get
6 into the case law, of course, the court should be guided
7 by these precedents, but make no mistake, Your Honor,
8 there has never been a state tort suit, a set of lawsuits
9 like those here. These cases are truly unprecedented.
10 And unlike any other previous battlefield contractor case,
11 these lawsuits, 60-plus lawsuits, 800-plus named
12 plaintiffs, these present a challenge to the very manner
13 and methods by which the military directed and performed
14 basic life support functions throughout two war theaters
15 across nearly a decade. It's an observation that this
16 court made long ago and it remains very, very true. And
17 in light of the evidence that's been presented, I would
18 submit that it's even more significant, the breadth and
19 scope and nature of the claims here unlike any other.

20 So I'll turn now to a quick summary of the key
21 take-aways from the case law. I'll begin with the
22 Carmichael case.

23 The background of the Carmichael case you're
24 aware it's a convoy accident, but I want to point out a
25 few things. One is the Carmichael lawsuit arose out of

1 the LOGCAP III contract, just like this one. The basic
2 contract principles, the basic contract provisions that
3 are applicable here are the very same provisions that were
4 applicable in Carmichael.

5 Also wanted to note that the Eleventh Circuit in
6 Carmichael recited some of these overarching regulations
7 that govern the relationship between contractors in the
8 battlefield and the military. And if these regulations
9 look familiar, it's because they've been presented in this
10 case. And I would just note for Your Honor that these are
11 not new regulations. This is not new doctrine, but in
12 fact these are doctrines and policies that have been in
13 place and have been discussed by all of these -- the
14 courts in all of these cases.

15 And the last note by way of background in
16 Carmichael is that the court noted there that, of course,
17 KBR had a contract under which there were regulations and
18 provisions that applied and the court even made reference
19 to this concept of performance standards which has been
20 made an issue in this case. And, of course, in that case,
21 the LOGCAP III contract governed KBR's performance and
22 there were performance standards in that case.

23 The Eleventh Circuit also noted this provision
24 in KBR's contract that states that KBR had responsibility
25 for supervising employees. Again that's a provision that

1 applied in every single LOGCAP III case. And I summarize
2 the background here with the core allegation which is
3 really it's a one day, one time allegation of failing to
4 comply with standards and the allegation that KBR's
5 negligence caused injuries there.

6 So turning from the background and I'll just
7 cover this very briefly. But the Carmichael case earlier
8 on in the jurisprudence surrounding these sort of recent
9 wave of battlefield contractor suits summarized kind of
10 how you look at the basic political question doctrine in
11 this context and said, yes, you have to do this
12 discriminating inquiry. You have to look at the precise
13 facts of the case and beyond that, you have to look at the
14 precise facts, the precise posture and look at how the
15 case would be tried, how the claims would be presented,
16 how the defenses would be raised and you have to determine
17 looking forward whether a political question will emerge.

18 And in other words, what is said here, which is
19 very fundamental is the court can't limit itself to high
20 level doctrine, it can't limit itself to policies that
21 might apply in any -- in all context. The court must look
22 past that to the specific facts, the specific context, the
23 specific claims and defenses and really dig in on those
24 facts to determine whether a political question will
25 emerge.

1 The next point on Carmichael that I wanted to
2 emphasize is again this notion of sensitive military
3 judgments and in this case, the Eleventh Circuit began
4 with the finding that looking at the key decisions
5 governing the challenged conduct, the military made those
6 decisions. These include at the date and time of the
7 convoy, speed, route, et cetera.

8 And the court went on -- the Eleventh Circuit
9 went on to make two very critical findings. The first is
10 that each of those critical decisions, each of those
11 decisions was made exclusively by the military. And the
12 second is that not only were these decisions exclusively
13 made by the military, but they are uniquely military
14 decisions. They are specific to and can be exclusively
15 made by the military because they require military
16 expertise and military judgment.

17 And then the bottom line conclusion is the
18 Eleventh Circuit then looked at the facts in Carmichael
19 and held that the circumstances of that case were so
20 thoroughly pervaded by these military judgments, these
21 military decisions, that it would be impossible to make a
22 determination regarding KBR's potential negligence without
23 bringing those essential military judgments and decisions
24 under searching judicial scrutiny.

25 In addition, the Carmichael court found that

1 given the very uniquely military character of the events
2 at issue, the fact that the military dimension of the
3 underlying events was so utterly central, that these types
4 of facts, these types of circumstances were very again
5 uniquely military and the court said we, courts, we lack
6 standards with which to review many basic questions that
7 are traditionally entrusted to the military.

8 I want to turn now to several of the arguments
9 that the plaintiffs in Carmichael made back when we
10 litigated these cases or -- I'm sorry -- this case. And
11 the first argument that I wanted to flag that was made by
12 the Carmichael plaintiffs is this notion that commanders
13 cannot give direct orders to KBR. That very argument was
14 made in Carmichael. Here is the quote from the case.

15 "The plaintiffs emphasized that the driver couldn't
16 receive orders directly from the military." The Eleventh
17 Circuit looked at that fact and said that's irrelevant.
18 The fact that the military order was conveyed through a
19 conduit says the Eleventh Circuit, that's a distinction
20 without a difference. It's really irrelevant to the
21 analysis.

22 The next argument that was made by the
23 Carmichael plaintiffs is that KBR had control and they
24 said, look, the way you look at control is down in the
25 weeds. You look at the KBR driver. He's driving the

1 truck. He can turn the wheel. He's the one in control.
2 And the Eleventh Circuit considered that position, looked
3 at the wealth of evidence in that case, pointing to the
4 pervasive military decisions and the Eleventh Circuit said
5 that's beside the point. That doesn't matter. It's a
6 little more than a play on the words "control" and
7 "responsibility." It doesn't change the fact that KBR in
8 that case was operating at all times under orders and
9 determinations that were made by the military.

10 And finally, the last argument that the
11 plaintiffs in Carmichael made was this argument that they
12 were only challenging KBR's conduct because it was KBR's
13 negligence alone so said the plaintiff that caused their
14 injuries. And in fact the plaintiffs pointed to evidence
15 in that record that suggested the KBR driver was at fault.

16 The Eleventh Circuit considered that argument,
17 again considered the wealth of evidence showing the
18 pervasive military decisions and judgments involved in the
19 circumstances at issue and the Eleventh Circuit said
20 there's no way, it is impossible for the plaintiffs in
21 this case to show that KBR was the sole cause and that as
22 a result, the court would need to consider pivotal
23 military judgments and that that was not permitted by the
24 political question doctrine.

25 Turning now, Your Honor, to the Fourth Circuit's

1 Taylor decisions. Some quick background. Again another
2 LOGCAP III contract. Another case in which the same basic
3 contract provisions, the same overarching regulations
4 applied and the Fourth Circuit recited those regulations.

5 Again the core allegation in Taylor had to do
6 with a maintenance worker turning on a generator on one
7 day at one time. And this is important. The allegation
8 which was accepted by the Fourth Circuit was that KBR had
9 acted directly contrary to a military directive. And the
10 quote here from the Fourth Circuit shows that that
11 allegation was, you know, considered by the Fourth Circuit
12 and ultimately, of no consequence to the political
13 question ruling.

14 And I note just real quickly that one of the
15 provisions in the LOGCAP III contract that was cited in
16 Taylor sort of basic safety provision was equally
17 applicable in the Carmichael case. But because the court
18 was conducting a discriminating inquiry, it considered the
19 relevance of that provision in light of the facts. And so
20 in Taylor, when it did its analysis, which I'll turn to in
21 a minute, it considered some provisions in the contract of
22 some consequence to the Taylor discriminating inquiry
23 analysis, whereas the Carmichael court looked at the same
24 provisions and didn't think they were relevant at all.

25 The Taylor court set forth those two factor

1 tests that we're all very familiar at this point, which
2 centers on these notions of control under the first Taylor
3 factor and under the second Taylor factor whether national
4 defense interests were closely intertwined with the
5 military decisions governing KBR's conduct.

6 And applying those factors to the Taylor case,
7 the Fourth Circuit found, first of all, that the military
8 didn't exercise plenary control over that conduct and that
9 was the maintenance of a generator under a specific work
10 order on one day. However, the Fourth Circuit quickly
11 turned within a sentence or two to find nonetheless,
12 there's no way we could try this suit without having to
13 review, assess, second guess these sensitive military
14 judgments.

15 And the sensitive military judgments in that
16 case for which the Fourth Circuit found there were no
17 discoverable or manageable standards for evaluating, that
18 the ones that the Fourth Circuit specifically focused on
19 had to do with how you set up an electric power system on
20 a military base, how you provide a basic core support
21 function to a military base. And the Fourth Circuit said
22 we, courts, relax standards to assess such matters. These
23 are matters committed to the executive political branches
24 of government and if we were to inject ourselves here, it
25 would show a lack of respect for the executive branch.

1 Turning from there to the Harris case from the
2 Third Circuit. Again a quick background slide. Another
3 LOGCAP III contract, another case in which the court
4 recited these overarching regulations, these overarching
5 doctrines governing contractors in the battlefield.

6 In that case, again we had an allegation that on
7 one day under a single work order or more than one work
8 order, KBR had failed to comply with certain standards and
9 again the allegation was that that failure was the cause
10 of plaintiff's injuries.

11 Turning to the holding in Harris. One of the
12 parts of the Harris decision that is often overlooked,
13 Your Honor, because it's in a footnote is that the Third
14 Circuit reaffirmed that where plaintiffs seek to directly
15 call into question strategic military decisions, where
16 they do that, the political question doctrine plainly bars
17 those claims. And in fact, this was such, I suppose, such
18 an obvious point, such an undisputed point that it was
19 relegated to a footnote in the opinion. The Third Circuit
20 cited the liability theories that directly called into
21 question strategic military decisions there and they
22 included the failure to warn, the failure to provide
23 alternative remedies. And the Third Circuit sort of gave
24 the back of the hand to those arguments and said no,
25 there's no way that those could get past this political

1 question doctrine, they are barred.

2 It went on to say, of course, that as to the
3 narrower claims involving installation or maintenance of a
4 single pump under a work order, the Third Circuit held
5 those may be justiciable. It didn't hold they were. It
6 said it may be. And, of course, the Third Circuit held
7 that there was a requisite choice of law analysis to make
8 that determination.

9 I turn now very quickly to the burn pit case. I
10 won't belabor this. I know Your Honor is very familiar
11 with this. But just for the sake of completeness, the
12 analysis from the Fourth Circuit in the remand opinion
13 focused very much on who made these key decisions and who,
14 the military or KBR, for example, decided to use burn
15 pits, et cetera.

16 I'll shift then to a more recent Fourth Circuit
17 case, the Al Shimari decision of 2016 and briefly discuss
18 this. First of all, by way of background, I think it's
19 clear from the Al Shimari opinion from the facts
20 underlying that case that it's a case of a very different
21 nature to the one we have here. It involves allegations
22 that are a world apart from the allegations here. But I
23 would say this is the most recent example in which the
24 Fourth Circuit has addressed the political question
25 doctrine in the context of a battlefield tort suit. I

1 would also note that that case involved allegations of
2 breach of contract and so there is certainly useful
3 guidance from the Fourth Circuit in the Al Shimari
4 opinion.

5 And turning to that holding, first of all, this
6 isn't particularly useful here, but the court pointed out
7 that unlawful conduct is justiciable irrespective. And I
8 think that quote is perhaps cut off, but it's not
9 particularly relevant here. What is relevant is what the
10 court said about conduct that's not unlawful, sort of
11 simple negligence, simple breach of contract claims.

12 What the Fourth Circuit said in Al Shimari was
13 claims that -- challenged conduct that was not unlawful,
14 those claims are shielded from judicial review when either
15 they are committed and occurred under the actual control
16 of the military or they involved sensitive military
17 judgments. So again this is the most recent exposition by
18 the Fourth Circuit on the political question doctrine as
19 applied to battlefield contractors.

20 Turning now to a few cases on preemption, the
21 seminal case here is the Saleh case. It is the Saleh case
22 provides the preemption test that was adopted by the
23 Fourth Circuit and will be applied by this court. So I'll
24 spend a little bit of time on Saleh.

25 The basic backgrounds in Saleh, again this is a

1 different type of animal I suppose, allegations of
2 torture, et cetera. But one point about Saleh that I did
3 want to point out is the procedural history of Saleh.

4 Saleh, the D.C. Circuit had before it claims
5 against two different contractors and the district court
6 judge had dismissed claims against one contractor, but not
7 against the other. It found that some claims were
8 preempted and others were not. And what it focused on to
9 make that distinction was the contractor's ability to
10 supervise its own employees. The district court pointed
11 to the army regulation 715-9, which has been cited in this
12 case and pointed out that, you know, under general policy,
13 under army policy, contractor personnel are not given
14 direct orders by the military. And again it pointed to a
15 provision in the contract in that case that said the
16 contractor is responsible for providing supervision for
17 contract personnel. And the D.C. district court thought
18 that was relevant. The D.C. Circuit disagreed. The D.C.
19 Circuit found it doesn't matter. It doesn't detract
20 meaningfully from the military's operational control. In
21 other words, it's a distinction without a difference.

22 The key fact according to the D.C. Circuit,
23 which adopted the preemption test at issue here, the key
24 fact was were these employees melded into the military
25 mission, were they performing a common mission. Again,

1 it's not were they being given direct orders by the
2 military. It's were they performing a common mission.

3 And so Saleh sets forth this very broad
4 battlefield preemption rule and I have a few quotes from
5 that decision here and I would just note for the court
6 that this language cited at the top of this slide that
7 "the federal government occupies the field," that's
8 language that echoes -- comes back in the burn pit
9 decision from the Fourth Circuit. It's quoted, it's cited
10 and it is adopted by the Fourth Circuit as applied here.

11 Turning to the specific test Saleh set forth, of
12 course, during wartime where the contractor is integrated
13 into combatant activities over which the military retains
14 command authority, the tort claims arising out of that
15 engagement shall be preempted. That's the test this court
16 will be applying. And I want to jump ahead a little bit
17 here because there's certainly some questions that this
18 test raises and the Fourth Circuit answered some of them.
19 And it said what does this mean, integration, control,
20 command, authority? what does that mean? And the Fourth
21 Circuit said by focusing on whether the contractor was
22 integrated, the Saleh test ensures that the FTCA will
23 preempt only state tort laws that touch the military's
24 wartime decision making.

25 And so as the Fourth Circuit interpreted this,

1 the key indicia of integration, the key indicia of command
2 authority is whether state tort law would touch military
3 wartime decision making. And so when you're trying to
4 determine where you draw the line, where is integration
5 sufficient, where is command authority sufficient, we
6 would submit the answer is not in a dictionary. The
7 answer is in looking at the claims, looking at the record
8 evidence and asking if these claims were allowed to
9 proceed, would state tort law touch military decisions?
10 That's the preemption test adopted by the Fourth Circuit.

11 One last point on Saleh, the plaintiffs'
12 arguments there included this notion that the government
13 itself had openly condemned the behavior at issue and as
14 the plaintiffs argued, the contractor there, so said the
15 plaintiff, breached its contract, the military lacked
16 authority to discipline Titan employees. That was of no
17 consequence. Those issues were immaterial to the
18 preemption analysis.

19 Just a couple of other cases on preemption, Your
20 Honor. The Harris case really just two points to make
21 there. One is as I referenced earlier, the broad claims
22 that challenge military decisions, those weren't at issue
23 in Harris. Its preemption holding didn't address such
24 claims. It's preemption holding did address these narrow
25 claims. And the finding of the Third Circuit in Harris

1 was that KBR had discretion in fulfilling individual work
2 orders and that as a result of that discretion, the
3 preemption defense did not apply.

4 And the last case I have here again for the sake
5 of completeness is the Fourth Circuit preemption holding,
6 which we have distilled really this notion of control and
7 integration, which, of course, the Fourth Circuit found to
8 be very much related concepts, a very much overlapping set
9 of facts. And this notion of control is distilled into
10 the question of who made the key decisions. And this
11 notion of the extent of integration is really gets down to
12 are these challenged activities ones that stem from
13 military decisions or is the plaintiff in the case
14 challenging matters that are within the sole discretion of
15 KBR?

16 And, Your Honor, we submit the take-away from
17 the Fourth Circuit and what's left for this court to
18 decide is really distilled into those two questions and
19 again it gets back to sensitive military judgments and
20 whether or not state tort law would touch, affect, impact
21 those judgments.

22 Your Honor, that closes my discussion of the
23 preemption case law. Very briefly, I wanted to touch on
24 the Kerns case that the plaintiffs have raised. Just to
25 make a few points about Kerns if I could.

1 Your Honor, I think this is an issue that this
2 court long ago recognized. That this court chartered a
3 course to avoid. This court entered a case management
4 order a long time ago in which it said "these issues of
5 control and integration, that's in one silo. These issues
6 of breach violations, it's in another silo. You all so
7 said the court, you're free to do discovery on either of
8 these things. But at the end of the day, the issues that
9 are up for grabs in our motion --"

10 THE COURT: But what's your response to their
11 contention that the breach question is relevant to the
12 question of control or lack of control? You've got an
13 out-of-control contractor breaching the contract all over
14 the place. That's as I understand their position. I
15 should consider it insofar as it relates not to the merits
16 of the case, but to the question of control.

17 MR. RUSSELL: The first answer, Your Honor, is
18 that's not how the Fourth Circuit framed the issue and the
19 second answer, Your Honor, is that if that were the case,
20 two things would be true. One is the plaintiffs on remand
21 should have told this court that this whole exercise would
22 be an exercise in futility because I don't know why we're
23 here if the proposition they begin with is you have to
24 accept breach and having accepted breach, we win. And
25 relatedly, I really think it conflates the merits with the

1 jurisdictional issue and if adopted, one would be contrary
2 to all of the prior case law, which involved allegations
3 of breach, but nonetheless found cases were barred. But
4 also it would require KBR to defeat the plaintiffs' claims
5 on their merits to establish that this court in fact has
6 no jurisdiction. And we suggest -- submit to the court
7 that there's no support in the case law for that, it's an
8 irrational rule and again, it's not how the Fourth Circuit
9 framed the issue.

10 THE COURT: All right.

11 MR. RUSSELL: Thank you, Your Honor.

12 THE COURT: Thank you.

13 MR. RUSSELL: If there is no other questions,
14 I'll turn it over to my colleague, Mr. Johnson.

15 THE COURT: All right. Mr. Johnson?

16 MR. JOHNSON: Good morning, Your Honor.

17 Your Honor, I suspect if we were in a
18 non-electronic world, we would have had to wheel box
19 trucks of banker boxes of documents to your chambers in
20 this case. And as a result, I do want to just focus the
21 court's attention on some evidence that was presented
22 during the course of this hearing and in the record. It's
23 by no means meant to be exhaustive. It is, of course, an
24 opportunity to answer any questions the court has about
25 the record that the defendants have created.

1 Initially, of course, I have some slides that
2 we'll go through. Mr. Razi is bringing up to the court's
3 attention.

4 So, Your Honor, the evidence in this case as in
5 the record as was presented in this witness stand in the
6 course of the last two days of hearings makes clear that
7 the military, starting with General Sanchez in 2003,
8 carrying forth well into 2010, decided to use burn pits
9 during the conduct of Operations Enduring Freedom and
10 Iraqi Freedom.

11 When General Sanchez arrived at the Baghdad
12 International Airport in 2003, he not only was conducting
13 a combat operation, he was also facing a health crisis.
14 He described overflowing latrines, he described trash.
15 And his concerns that, of course, you can't fight a war
16 with sick service members and their health is paramount to
17 his ability to conduct a military operation. And this is
18 exactly what he told you and it's what you see here on
19 this screen before you, which is that within 48 hours of
20 arriving, he mandated the use of burn pits. And he was
21 asked what he expected to be burned in those burn pits and
22 he said the things that a deployed force produces.

23 And he made that decision not based on, you
24 know, some sort of hasty thought process, but based on his
25 understanding of the operational environment of his

1 requirements of his resource limitations and that was the
2 order that he implemented and he was the only person who
3 had the type of information to have made that type of
4 analysis as he said in the next slide.

5 And I don't want to go through all of his
6 hearing testimony here, but the point of this reference
7 from March 9th at page 85 is that he's going through this
8 risk benefit calculus. And this is really key to
9 understanding the process is that it requires General
10 Sanchez from his aptitude and with his ability to
11 understand the political situation and the operational
12 situation and the resource situation, to weigh all these
13 risks and benefits and decide how he is going to keep his
14 service members safe and that's exactly what he told the
15 court on Thursday.

16 Of course, General Vines sat in the same witness
17 box and he testified that when he was the commanding
18 general of Multi-National Corps, Iraq in 2005, he reached
19 the same conclusion, that he continued the use of surface
20 burning that had been employed and he talked about the
21 factors that he considered. He was an infantry officer in
22 the United States Army, a three-star lieutenant general
23 and he told this court that the kinetic environment in
24 Iraq in the spring of 2005 was the most violent he had
25 ever seen. He talked about vehicle-borne IEDs exploding

1 in convoys. He talked about how every movement outside of
2 the wire was a combat operation. He talked about the
3 delicate, tenuous political process of trying to
4 transition an entire country's government from a coalition
5 force to the ministry of Defense and the ministry of the
6 Interior in the Iraqi government and within that
7 complicated calculus, he made the determination that using
8 surface burning and using burn pits was the best method of
9 waste disposal. And so waste disposal continued.

10 And he said that, you know, he was aware that
11 they were -- he said as he flew in -- you heard him -- he
12 saw burn pits operating. This wasn't a secret to him.
13 Right? That he spent ten hours in the course of his time
14 as the commander thinking about waste management issues
15 and he decided to make no changes.

16 And, of course, the court has also already
17 referenced General Petraeus' letter to Congress from 2008
18 where he tells Congress that there is and there will
19 continue to be a need to use burn pits during contingency
20 operations. The court also has Mr. Loehr from DCMA, his
21 2010 letter directing that KBR should continue to use burn
22 pits, right, particularly focusing on the use of burn pits
23 in the CENTCOM environment. And the court has the
24 Department of Defense reports of Congress also from 2010
25 where the Department of Defense talks about the continued

1 need to use burn pits in theater.

2 And I would note within the excerpt in front of
3 the court here from KBR Exhibit 58 that it specifically
4 says that it's about balancing combat risks against other
5 risks such as environmental exposures. Again it's this
6 process of commanders of military leaders making risk
7 benefit analyses that only they are capable of making and
8 then implementing those decisions.

9 And so, Your Honor, that record is clear and the
10 court actually alluded to that on Friday when it was sort
11 of giving its instructions to the parties about what it
12 wanted to discuss. And plaintiffs have presented no
13 contrary evidence to suggest that the military commanders
14 did not make these decisions. They weren't cross-examined
15 about not making these decisions. And so that part of the
16 record speaks for itself.

17 The thing that requires I think a little bit
18 more clarification unless the court has questions about
19 the military's decision to use and locate burn pits is the
20 question of how that military intent becomes action, how
21 KBR begins performance.

22 And the evidence is clear that once that
23 military commander issues a direction and makes a
24 decision, DCMA serves as a conduit to take that intent and
25 ensure that KBR performs accordingly. DCMA is not a

1 medium that shifts the commander's intent because that
2 would be inconsistent with the type of risk benefit
3 calculus that we just discussed. So the first step in the
4 process is that the commander makes this analysis.

5 And Your Honor has the LOGCAP 101 document in
6 the record. You see the citation here and it describes
7 the different roles that everybody plays in this LOGCAP
8 process. And, of course, if you look at the supported
9 unit section, which is the commander, right, it's General
10 Sanchez, it's General Vines, they're the ones who define
11 the operational needs, they're the ones who conduct the
12 mission analysis. And without going through all of the
13 other, you know, 42-odd check marks on this page, nowhere
14 else in any of these other columns does any other entity
15 have the responsibility for conducting that analysis and
16 making that commander's intent.

17 And, of course, what happened in this case.
18 Again the generals told you that they considered service
19 members' health, they considered the effect on military
20 operations and logistics and expediency and costs and the
21 local population. And you heard about some of the
22 specific injects that they had. Right? You heard from
23 Dr. Postlewaite who told you that the military had a
24 robust program of evaluating the environmental and health
25 situation in Iraq and Afghanistan and that that

1 information was fed to commanders. He says at KBR's
2 Exhibit 14, lines 121-2 to 122-4, that we probably knew
3 more about the environmental conditions in Iraq than we
4 did about many places in the United States. And you've
5 seen some of those documents and they're attached to KBR's
6 statement of facts as Exhibits 124 to 133 that reflect the
7 type of analysis the military was conducting. And you
8 heard from the generals both in their declarations and
9 their depositions and their testimony that they were aware
10 of those risks and those evaluations and they were part of
11 the process.

12 But if you look at KBR's Exhibit 120, which is
13 the MNC-I Environmental SOP at page 4, paragraph 4(d), it
14 says explicitly that the environment is subordinate to
15 operations. Right? These operational considerations are
16 what drive a commander's decision making. And so again
17 and again what conclusion did the commanders reach? They
18 reached the decision to continue to use burn pits.

19 So having made that decision, what happens next?
20 DCMA receives that instruction. And they instruct KBR to
21 accomplish the commander's intent.

22 And there is very important testimony from
23 General Sanchez and General Vines about not necessarily
24 the technical process here which we'll describe in a
25 moment, but the substantive process, right, which is the

1 DCMA's mission is the same as the military's mission.
2 KBR's mission is the same as the military's mission. But
3 if we take a step back and we remember the historic
4 context for LOGCAP III and for the use of contractors on
5 the battlefield, these are individuals and institutions
6 that are there to provide the functions that the military
7 otherwise would provide. It's what General Vines talked
8 about. He said the military doesn't have the organic
9 ability to provide all of these services for the duration
10 that needs to be provided. So it's inherent in that that
11 the provision of those services aligns those services with
12 the overall military mission.

13 So even though these are to varying degrees and
14 in varying ways that we can discuss different
15 institutions, the goal that they are seeking to achieve is
16 the same and that mission is defined by the commander,
17 right, whether that's General Sanchez or whether that's
18 General Vines. And that's exactly why General Vines told
19 you, Your Honor, and we have the hearing transcripts in
20 front of you that DCMA or the Army Material Sustainment
21 Command could not change the commander's intent because
22 they don't have the ability to go and conduct that risk
23 benefit analysis that the commander conducted. Right?
24 And he says it right here. Says it right at lines 28 to
25 29 in his transcript. Well, the reason they can't do it

1 is because it has effects, right, because the commander
2 has to conduct an analysis of how those decisions are
3 going to affect the military operations. And DCMA,
4 despite being part of the Department of Defense, is not
5 the commander.

6 Colonel Damon Walsh who you didn't hear from,
7 but whose deposition testimony at lines 139-9 to 13
8 addresses this issue, talked about how even though again
9 General Sanchez is not within the Defense Contracting
10 Management Agency, it was the Defense Contracting
11 Management Agency's responsibility to convey and
12 communicate his orders to that institution.

13 Now there is, of course, the contracting piece
14 which plaintiffs spent most of their opening talking
15 about. And so without belaboring every task order and
16 every statement of work and every ACL and LOTD, I do want
17 to give the Court a high level overview and point the
18 court to the relevant documents for review.

19 So the first step in this process, of course, is
20 LOGCAP III itself and I just pulled a couple of excerpts
21 here by way of example for the court to show that the
22 LOGCAP III original base contracts has these very high
23 level general provisions that don't in and of themselves
24 provide particular guidance. Right? It's been referred
25 to in some circumstances as a menu or a set of

1 requirements.

2 what happens is that the DCMA issues task orders
3 and statements of works. And this is an important place
4 to pause. And actually, Your Honor, if I may approach
5 with a copy of KBR's Exhibit 4, it's worth a little bit of
6 consideration. Your Honor, Exhibit 4 is a declaration
7 from Mary Wade who is a 30(b)(6) witness for KBR. And I
8 want to focus the court's attention specifically if it
9 flips to page 4 to paragraph 15 because it talks about
10 where statements of work and task orders sort of fit in
11 this contracting process. And in particular, if you look
12 at the very end of the paragraph, it says that task
13 orders, statements of work along with the notice --

14 THE COURT: Give me that paragraph number again,
15 sir.

16 MR. JOHNSON: Yes, Your Honor. It's paragraph
17 15. It's in Section 3, page 4.

18 THE COURT: Okay. I got it. Thank you.

19 MR. JOHNSON: And she describes this whole
20 process. She describes how the task order and the
21 statement of work are actually created. And then she says
22 at the end that that is the document that initiates KBR's
23 performance.

24 And Your Honor obviously was tracking this exact
25 same issue because you asked Roger Singleton this question

1 after his testimony ended and the transcript is at page
2 130. Right? And you said in other words, it would not be
3 a surprise to you if a task order didn't say operate the
4 burn pit and it simply said waste management and
5 Mr. Singleton responded to your question and said correct.
6 And then you asked and the form of that waste management
7 would be a military determination and he said Yes, Your
8 Honor.

9 So again the first step in this process is to
10 look at the task orders and statements of work. And
11 there's a little bit of context to be had there as well,
12 which is as this war continued on from Afghanistan 2001,
13 Iraq 2003 and as these task orders and statements of work
14 evolve, KBR is already performing these services. Right?
15 So as a new task order arises, it doesn't necessitate that
16 KBR restart the process. Right? The process continues
17 with whatever modifications the military and DCMA and KBR
18 have agreed to.

19 If I could direct the court's attention as well
20 to Defense Exhibit 20, which is the declaration of Damon
21 Walsh from DCMA. And he says at paragraph 24(b) that
22 DCMA's role in creating task orders and statements of work
23 is to translate the military's requirements into contract
24 language. So again there is that idea that the
25 commander's intent.

1 Moving directly into the contract documents.
2 And then he says at paragraph 24, Charlie, in the
3 statement of work that leads to the -- he said the
4 statement of work leads to a base-by-base analysis of the
5 services KBR would provide. So again there we have the
6 statement of work as the initial document that provides
7 that base-by-base guidance for KBR to begin specific
8 performance.

9 I would also note, Your Honor, that at Defense
10 Exhibit 26 at page 127-12 to 18, Damon Walsh also talks
11 about the fact that there's no specific authorization
12 required to use a burn pit because as he says at 131, the
13 presumption is that you were going to burn it.

14 So that's how the contracting process begins the
15 implementation of taking the commander's intent and
16 converting it into KBR performing an action on the ground.
17 It could be that KBR's taking over a process the military
18 is performing itself. It could be that KBR is continuing
19 something that KBR had already been doing. It could be
20 that KBR is starting new work. Right? But it is that
21 statement of work contract document that drives the
22 process.

23 Now I do want to address administrative change
24 letters and letters of technical direction, even though I
25 don't want to overstate their importance as I believe

1 plaintiffs' counsel did during opening argument.

2 The administrative contract letters and letters
3 of technical direction are contract documents that shape
4 the performance KBR is already engaging in. So these are
5 contract documents that can be issued by administrative
6 contracting officers to direct KBR to change the manner of
7 its performance or to start some service that's permitted
8 under statement of work that wasn't previously being used.

9 So Your Honor has this CD and if you look at
10 this map, these are all interactive links and you can
11 click on them and it will bring you to the actual contract
12 documents. But back to our truck full of bankers boxes.
13 Instead of going through all of them, we will just go
14 through a couple.

15 So we'll start with FOB Echo here on the map.
16 And this is just an example of the type of granularity and
17 specific control that could potentially be in an LOTD or
18 an ACL. So here KBR is directed specifically to build a
19 second burn pit adjacent to an existing burn pit and to
20 alternate the burning in those burn pits. Right? So the
21 base commander at FOB Echo for whatever reasons that
22 particular base decided that the manner he wanted his burn
23 pit operated in was to have two of them side by side and
24 to have them burn one and then the other because it might
25 potentially reduce smoke which is the issue identified in

1 this document slide.

2 If we turn to Camp Taji, for example, we have a
3 June 2005 memo where the base commander specifically
4 instructs KBR to burn animal carcasses completely to ash
5 at the existing burn pit. So at Camp Taji, there's a
6 specific issue that requires the commander to reach out to
7 KBR and say this is a service I want you to perform.
8 They're obviously already operating a burn pit, but I want
9 you to burn this specific item.

10 So what's important about these documents?
11 What's important about these documents is that they do
12 reflect, of course, that KBR was authorized to conduct
13 burn pit operations at whatever base these are for even
14 though they are not the base authorization documents. But
15 they also give us a good window into how the military
16 controlled KBR's burn pit operations because, of course,
17 you don't have ACLs and LOTDs for most bases for most
18 periods of time. Even though we, of course, know that KBR
19 was performing burn pit operations and that they were
20 being evaluated and that's because if KBR was performing
21 in a way that the military deems sufficient, it didn't
22 require additional documentation. It didn't require a
23 follow-on ACL or LOTD because KBR could simply continue to
24 perform in the manner that they had been performing.

25 And that's consistent with what General Vines

1 told you about how when he landed in country, burn pits
2 were already being used and he didn't have to issue a new
3 order. Right? At a high level, he could just continue to
4 use burn pits because burn pits were being used.

5 So the next step in this four-step process of
6 converting the commander's intent into actions that KBR
7 actually executes. And of course, the reason we're here
8 is that we know that KBR did in fact implement the
9 commander's intent because they did operate burn pits on
10 behalf of the military in Iraq and Afghanistan. There's,
11 of course, some dispute about exactly when and where. But
12 for purposes of the jurisdictional questions before this
13 court, KBR did in fact operate burn pits for the United
14 States military during Operations Iraqi Freedom and
15 Enduring Freedom.

16 And then this brings us to the last point which
17 I do think is important to understand in light of
18 plaintiffs' authorization argument. Once KBR begins
19 performing a service for the military, DCMA immediately
20 begins reviewing it and you heard from many different
21 witnesses who talked about this. At the very lowest
22 level, you heard from our charismatic Commander Hersch who
23 sat in the witness box and he told you about his stick and
24 how he got in the burn pit and he poked around at the
25 trash bags. Now he had his checklist. Right? He was the

1 Mayor of Bucca. I'm sure we were -- sheriff. Excuse me.
2 Sheriff of Bucca. I mean we could probably all picture
3 him, right, in the burn pit without his badge, but
4 nonetheless, with his flack and his kevlar out there
5 poking around. That's the base level of review of KBR's
6 services. Right? Quality assurance representatives like
7 Commander Hersh and contracting officers representatives
8 who are actually uniform service members, members of the
9 military who were out there reviewing KBR's performance.

10 And then it rolls up through the administrative
11 contracting officers and this court, you know, has heard
12 testimony from Wes Bennett and Augusta Fehn. And, of
13 course, KBR is there and this court has heard testimony
14 from David Palmer and from Roger Singleton and from Mike
15 Mayo.

16 And then the operational units themselves also
17 have oversight over KBR's performance. You heard me ask
18 General Vines about his staff judge advocates and the
19 liaison he had in the fore and his contracting officers
20 and these are individuals who are tasked with ensuring
21 that KBR is performing not necessarily so much according
22 to the terms of the contract, but according to the
23 commander's intent.

24 And I want to draw the court's attention
25 specifically to two witnesses that I don't think have been

1 mentioned in the course of this hearing yet and yet, are
2 very important and they are Jim Morris and Mary Sheridan,
3 Defense Exhibits 144 and 145.

4 Now the reason I draw the court's attention
5 specifically to these declarations as well as the
6 associated depositions is that Ms. Sheridan and Mr. Morris
7 were the agency 30(b)(6) representatives in the course of
8 this litigation and they gave these declarations and they
9 were deposed.

10 And if you start with Exhibit 144, which is Mary
11 Sheridan's exhibit and you turn to paragraphs 9 and 10 of
12 her declaration, she specifically talks about the award
13 fee process and she talks about the people we just named,
14 the administrative contracting officers, quality assurance
15 representatives, QARs, property administrators, the LOGCAP
16 support office, contracting officer representatives,
17 contracting officer technical representatives and the
18 process of not just overseeing KBR, but specifically as
19 she says in paragraph 10 of overseeing KBR's performance
20 of non-hazardous solid and liquid waste management and
21 disposal services, including burn pit services based on
22 the results of DCMA's monitoring and inspections as well
23 as the criterion in the LOGCAP III award fee plan.

24 So here's the Defense Contract Management Agency
25 telling us exactly how they oversaw KBR's performance once

1 it began implementing the commander's intent. And
2 similarly at Exhibit 144, if I could direct Your Honor's
3 attention to paragraphs 7 and 10 --

4 THE COURT: 144 or 145?

5 MR. JOHNSON: 144, Your Honor. The first one
6 was 145. That was Ms. Sheridan. And 144 is Mr. Morris.

7 THE COURT: Okay. I got you.

8 MR. JOHNSON: So Mr. Morris at paragraphs 7 and
9 10, he again talks about QARs and ACOs and he talks about
10 how statements of work are the applicable task order
11 documents. And then he talks about all the realtime
12 inspections, right, and the mechanisms that DCMA had to
13 control KBR.

14 THE COURT: And what were those paragraph
15 numbers again?

16 MR. JOHNSON: 7 and 10, Your Honor.

17 THE COURT: 7 and 10. Okay. I got it.

18 MR. JOHNSON: Yes, sir. And, of course, the
19 result of all of this is as you've seen in the record and
20 as you've heard is that KBR's performance is evaluated at
21 performance evaluation boards and every six months --
22 every -- monthly at performance evaluation boards and
23 every six months at award fee evaluation boards. And
24 there are many PEBs and AFEBS in the record and I would
25 direct your attention specifically to Defense Exhibit 4

1 which is Mary Wade's declaration which has several PEBs
2 and AFEBS attached to it. But just for the purposes of
3 the demonstrative, I have attached Appendix B to Defense
4 Exhibit 145.

5 And again, right here is the Defense Contract
6 Management Agency. This time under Task Order 159
7 specifically evaluating KBR's performance of burn pit
8 operations under the task order. And these documents move
9 through time through the different task orders. This is
10 just meant to sort of demonstrate to the court what the
11 documents look like. But at regular intervals, as you see
12 in 144 and 145, starting in 2003 and carrying on
13 throughout the process, DCMA from Commander Hersch all the
14 way up to Damon Walsh, the Commander of DCMA, right, this
15 process of careful and regular oversight of KBR is
16 occurring.

17 Now one other way to consider this and I'll move
18 through this demonstrative quickly is to consider sort of
19 the cycle of how the commander's intent and direction
20 becomes a KBR action on the ground. So the first step, if
21 you look at the bottom of our rope here, right, the
22 statement of work defines what needs to happen and that
23 statement of work is drafted with consultation between the
24 supported unit, what their needs are, with DCMA and KBR.

25 Then once the statement of work exists, that

1 supported unit, here represented in green identifies the
2 need which we've discussed. Then DCMA issues a project
3 planning request to KBR which you see depicted there in
4 tan. Then KBR prepares a project planning estimate which
5 is depicted there in red. Then you go through the review
6 boards, the CARB and the JARB who look at that estimate.
7 Then the unit itself, the supported unit ensures that it
8 can actually afford whatever task it's requested. If the
9 unit agrees and can secure funding, then DCMA instructs
10 KBR to proceed and then KBR begins performance. And again
11 all the colors are represented here because once KBR
12 begins performance, DCMA and the military are overseeing
13 that performance.

14 And then of, course, if the military wants to
15 tweak, if the commander of the supported unit wants to
16 change the method of KBR's provision of those services, it
17 can through LOTDs and ACLs. So the process begins anew,
18 right, whether it's a new task order or a new statement of
19 work.

20 And the reason I bring this up is not to get
21 deep into the weeds on some of these technical aspects of
22 the process. The reason I bring this up is to show that
23 once the unit identifies the need, that need doesn't
24 change. Once General Sanchez says burn pits, nowhere in
25 this process, nowhere in the process I've just described,

1 nowhere in the evidence, nowhere in any of the plaintiffs'
2 documents or from the mouths of any witnesses has anybody
3 said that DCMA then has the authority to change that
4 commander's intent.

5 Your Honor asked specifically to receive some
6 information about the water issues in this case and so I
7 do want to direct the court's specific attention to some
8 parts of the record. There's not really any dispute, of
9 course, that the military controlled and directed
10 provision of water for soldiers. I mean you heard General
11 Sanchez talk about what an essential issue water is to
12 commanding troops in combat.

13 The specific documents that I would point the
14 court to, first of all, these are all described in the
15 defense's statement of facts, particularly paragraph 44.
16 But if we want to walk through sort of how the documents
17 nest, the first thing that happens is you have a task
18 order and by way of a demonstrative, I would point the
19 court to Exhibit 9 within Mary Wade's declaration which is
20 Exhibit 4 to the defense statement of facts and that's
21 Task Order 59 from 14 November 2003.

22 Within that task order, in Section D, Delta, 10,
23 it specifically identifies what you have here on your
24 screen which is TB Med 577 and TB Med 577 is a military
25 guidance document that describes the method of water

1 production and the method of measuring and evaluating
2 water production and actually in that same paragraph, in
3 paragraph D-10 of Task Order 59, you'll see other
4 performance requirements. And just again by way of
5 example, it says that the water has to have between three
6 and four parts per million of chlorine per unit. So these
7 very specific water production requirements, the use of a
8 reverse osmosis water purification unit, for example. And
9 so Your Honor will see that.

10 And the thrust of the water issue is that it's
11 another example of clear military control. I mean the
12 commander controls the provision of water for service
13 members. There's no dispute about that. Then LOGCAP III
14 at the highest level permits KBR to provide water services
15 for the military. These task orders turn on those
16 services as you see in Task Order 59 that I just mentioned
17 and then within those task orders or in the related
18 reference documents, KBR is instructed on how to perform.
19 And as you'll see in the defense statement of facts, the
20 military reviewed KBR's performance, evaluated it through
21 the DCMA process we described and KBR was compensated for
22 those services.

23 So it bears taking I think a quick step back to
24 where we started on Thursday morning just to think about
25 the rest of the evidence that has or has not been

1 presented to this court. The plaintiffs have conceded by
2 not cross-examining the generals and by not presenting
3 contrary evidence that the military decided to use burn
4 pits. We heard it in this court. And so instead they
5 focused their inquiry on contract documents and they say
6 this is where the court should be focused.

7 And again they focus on Section 8.8 and
8 depending on the task order, right, saying that this is
9 where the court should conduct its discerning inquiry into
10 what the contract required.

11 But the inquiry does require a little bit more
12 discussion. There's been a lot of reference to
13 regulations in this case. And there are some issues
14 associated with that. First, LOGCAP III was not a
15 contract that only applied to the contingency environments
16 of Iraq and Afghanistan and you can see that. Again look
17 at Exhibit 4 for Mary Wade, you'll see the master contract
18 for LOGCAP that's attached there.

19 So the reference to various provisions in that
20 contract don't necessarily implicate the use of that
21 particular provision in Iraq or Afghanistan. For example,
22 the Overseas Environmental Base Guidance document that you
23 see referenced on top specifically says in Section C-133
24 that it doesn't apply in contingency operations and in
25 hazardous areas and in hostilities, any of which would, of

1 course, define Iraq and Afghanistan. Now it might apply
2 to Bahrain or it might apply to Kuwait. Right? But it
3 doesn't apply to Iraq and Afghanistan. And, of course,
4 there's been no evidence, right, no expert, no DCMA
5 commander, no person to say that somehow this rather plain
6 language applies.

7 OSHA, of course, which is also mentioned by
8 plaintiffs doesn't apply extraterritorially with the
9 exception of some of the places mentioned here in 29 USC
10 653(a). Again, no reason to believe that OSHA somehow now
11 applies in Iraq and Afghanistan merely because it's
12 referenced in a contract that applies much more broadly
13 than Iraq and Afghanistan. That's also true of RCRA which
14 the plaintiffs have referenced.

15 And I note, too, that there was some reference,
16 Plaintiffs' Exhibit 2002 to the 2009 MNC-I SOP. That's
17 also slightly misleading because that 2009 MNC-I SOP is
18 not actually ever incorporated into any of the task
19 orders. That 2006 MNC-I SOP is, but it has very different
20 discussions about burn pits. So to reference the 2009
21 version and say that it creates a standard when it
22 explicitly was never adopted is misleading.

23 So what witnesses did we hear from and how do
24 they affect the issues before this court? In the
25 beginning, plaintiffs told you you were going to hear from

1 from Mr. Robbins. And, frankly, I'm not sure that what
2 Mr. Robbins had to offer really has much bearing on this
3 court's decision. If anything, I think the biggest
4 take-away from Mr. Robbins' testimony is that his sighting
5 of a burn pit next to the existing burn pit at Camp Echo
6 is exactly consistent with the process we've been, you
7 know, talking about here for the past 25 minutes, which is
8 that DCMA directed KBR to create a new burn pit. A KBR
9 site manager senior to Mr. Robbins instructed him where to
10 build it within an 800 by 800 meter box adjacent to the
11 other burn pit, not on this side of the road and then to
12 start performance.

13 Now he doesn't understand the contracting
14 process more broadly. That's fine. That wasn't his
15 responsibility. But taking his testimony at face value,
16 it nests perfectly within the process that has been
17 presented to this court through other witnesses.

18 And, of course, as far as this issue of
19 violations goes, he doesn't actually offer any testimony
20 that KBR committed any violations or breaches of contract
21 because he has no idea what the contract requires. He
22 just personally subjectively interpreted some of the
23 things being burned to be problematic.

24 You also read I know late into the night, you
25 know, hopefully, with a glass of Scotch or something the

1 deposition testimony of Mr. Lockhart. And the take-away
2 from Mr. Lockhart is that Mr. Lockhart is essentially a
3 microcosm for plaintiffs' evidence. Mr. Lockhart talks a
4 lot about things being burned in burn pits. But when you
5 drill down on the important jurisdictional issues, he
6 makes two points. The first is that he's unequivocal that
7 the military owned the use of land on bases. Right? They
8 decided where everything went and we got four citations to
9 his deposition transcript here.

10 He also talked about how the military directed
11 him when to operate burn pits. He had to burn less
12 because of flight operations or burn less because of
13 security reasons. So again on the issues before this
14 court, on the factual issues that matter to this court,
15 Mr. Lockhart supports KBR's position.

16 And you heard 52 minutes of video testimony from
17 Augusta Fehn. Again to the main point that I have been
18 focusing on through this factual discussion, she focused
19 on the fact that KBR was following the military's request.
20 Right? That they worked together, but the goal was always
21 to accomplish what the military wanted to do.

22 She stated again as I've already talked about
23 earlier, the statements of work were the primary document
24 for directing KBR. And, of course, she had just as no one
25 has had, she had no testimony about somehow KBR not being

1 authorized to perform burn pits.

2 So it bears brief note that, of course, no
3 witnesses took the stand or, you know, had or deposed that
4 testified to any sort of the key points in plaintiffs'
5 opening. First, not a single witness from DCMA or from
6 the military or from the supported unit or from KBR came
7 in and said that once a commander's intent is issued, such
8 as General Sanchez saying to operate a burn pit, the DCMA
9 can change that intent. You did hear from General Vines
10 very clearly that they might come back and say they can't
11 do it and that's fine if the contract doesn't permit that
12 service to be provided. But you never heard that DCMA
13 could change the commander's intent and have KBR perform
14 something other than what the commander directed.

15 Again, you never heard a single witness,
16 including ACOs and QARs and CORs to come into this
17 courtroom or testify in a deposition that KBR actually was
18 unauthorized to operate the burn pits that it operated.

19 Everybody was consistent about the fact that the
20 military determines land use, right, from the generals all
21 the way on down to Mr. Lockhart at the lowest level. The
22 testimony is very consistent that the decision on where to
23 locate things on bases is a purely military decision and
24 it makes sense that it's a purely military decision for
25 the same reasons that only commanders can conduct the type

1 of risk benefit analysis that we talked about earlier.

2 And then this idea that somehow the military's
3 direction on how to operate burn pits applied only to the
4 military and not KBR. It's a confusing idea and concept
5 because again focusing on the risk benefit analysis, why
6 would a commander have the military using burn pits, for
7 example, when resource constraints are one of the driving
8 factors in that decision and then on the other hand, have
9 KBR shipping incinerators into country running into those
10 same resource problems? Right? It would affect the same
11 operation and the same mission. So bifurcation is not
12 consistent with the method of operation of wars in the
13 contingency environment in the first instance. But in the
14 second instance, there's just been no testimony or
15 evidence to suggest that somehow the manner in which the
16 military operated burn pits was different than the manner
17 in which KBR operated burn pits.

18 So at the end, this sort of authorization
19 argument just comes down to the idea that the generals
20 authorized the use of burn pits. Nobody disputes that.
21 DCMA had an obligation to instruct KBR to operate
22 consistent with the commander's intent. Nobody disputes
23 that. KBR operated burn pits in Iraq and Afghanistan as
24 instructed by the commanding generals of the coalition
25 forces in those theaters. Nobody disputes that.

1 The issue seems to be this idea that somehow
2 when DCMA was instructing KBR to perform, it didn't know
3 that KBR wasn't authorized to operate burn pits or that
4 the hundreds of staff judge advocates in General Vines'
5 staff didn't know that KBR was unauthorized. That seems
6 to be the implication, but there's been no evidence of
7 that. The story is much simpler.

8 The evidence that KBR has presented is simply
9 that having evaluated all of the complex factors that have
10 to get evaluated in making wartime decisions, the
11 commanding generals and the Department of Defense elected
12 to use burn pits as an expedient and perhaps messy way of
13 disposing of wastes and they continued to reinforce those
14 decisions for the years and years and years after 2003.
15 And that DCMA tasked KBR in certain instances to operate
16 those burn pits through statements of work and then at a
17 more granular level through ACLs and LOTDs. That evidence
18 is unrefuted in this case and KBR believes as our
19 colleagues will discuss that when those facts are applied
20 to the law, these cases should be dismissed for the
21 reasons discussed. Does the court have any factual
22 questions that KBR can answer?

23 THE COURT: No. It's very helpful. Thank you.

24 MR. JOHNSON: Thank you, Your Honor.

25 THE COURT: Before your next colleague addresses

1 the court, I want to acknowledge the presence in our
2 courtroom of a new group of visitors that just came in
3 from Ripon College being escorted by my colleague, Judge
4 Peter Messitte, whose son is president of that institution
5 and that's why we're being watched and welcome, Judge
6 Messitte, and the visitors from Ripon College. You may
7 proceed.

8 MR. MATTHEWS: Thank you, Your Honor. Judge
9 Messitte.

10 Your Honor, I proceed at my peril in correcting
11 anything Mr. Johnson said. Perhaps the court has already
12 figured out based on his high and tight, based on his
13 posture, based on his use of words like 24 Charlie and 24
14 Delta, that Mr. Johnson is actually Major Johnson, United
15 States Marine Reserve, who is about to become a judge in
16 the United States Marines I would point out. So I tread
17 lightly when I correct Major Johnson. But in fact, Mary
18 Wade was not a 30(b)(6) --

19 THE COURT: Chief Magistrate Judge Connelly of
20 this court also acted as a military judge. So he can tell
21 you what you're in for.

22 MR. MATTHEWS: Thank you, Your Honor.

23 Mr. Russell noted that as we move on to the
24 political question doctrine, which is the issue I'm going
25 to address that the plaintiffs bear the burden of

1 establishing subject matter jurisdiction. Major Johnson
2 has just summarized the facts that when combined make it
3 clear that these claims simply are non-justiciable.

4 I thought we would try to break that down, Your
5 Honor, and look at each of the claims that plaintiffs have
6 made and try to sort out exactly how the facts apply to
7 the law.

8 So plaintiffs essentially have made four
9 arguments that I can discern. The first is that it was
10 KBR and not the military that made all the key decisions
11 regarding waste management and water production. And
12 second, that the military told KBR what to do, although
13 that sounds like military direction, but not how to do it.
14 Third, that KBR violated the contract and that's what
15 caused the injuries. And fourth, although a variant of
16 the compliance issue, the violation issue, that KBR
17 operated burn pits without authorization as Mr. Johnson
18 just referred to.

19 So let me first address the key decisions
20 issues. What are the key decisions? Interestingly
21 enough, plaintiffs complaint aligns closely with what the
22 Fourth Circuit thought were the key issues. So
23 plaintiffs' complaint includes the use of the burn pits,
24 the location of the burn pits. The notion of incinerators
25 and recycling I think is just the flip side of the method

1 because they're either using one or the other. And then
2 also plaintiffs allege that KBR burned plastics and other
3 prohibited items. As I said, that aligns pretty perfectly
4 with what the Fourth Circuit thought were the key issues
5 that would be outcome determinative on the control issue
6 and those were essentially who decided to make the key
7 decisions, who decided to use burn pits, who decided where
8 to locate burn pits. And as this court knows, the Fourth
9 Circuit concluded more evidence was necessary and so we've
10 gone out and obtained that evidence.

11 And what we have heard over and over again from
12 the witnesses, be they KBR witnesses or witnesses
13 designated by the plaintiffs is that it was indeed the
14 military who made the decision on use, who made the
15 decision on location, who made the decision on
16 incinerators, what would be burned and as you've heard,
17 how all of that was put together through a risk analysis.

18 It is interesting to note, if you go to the next
19 slide, that of these many, many witnesses who spoke to
20 those issues, they fell into two buckets at the end of the
21 day. The ones who said it was the military that decided
22 and those who said I don't know. Now among those are
23 both, as I said, KBR and plaintiff witnesses and I did
24 want to point out to the court that of the six witnesses
25 that KBR presented at last week's hearing, Dr.

1 Postlewaite, Commander Hersh and Mike Mayo, all three of
2 those witnesses were not only presented as witnesses by
3 KBR -- as witnesses on whom KBR relies, but they were also
4 on plaintiffs' list of witnesses on whom plaintiffs rely.
5 So their testimony essentially has been adopted by the
6 plaintiffs. And they own the testimony from those three
7 witnesses on the method and use issues.

8 We have witnesses from the general side, if you
9 will, the supported unit side that are reflected here as
10 well as from DCMA and again they concluded either that
11 they didn't know when they didn't know or that it was the
12 military. None of them said it was KBR.

13 Let's just look at a few of those. I think at
14 this point I'm going to run through these quickly because
15 I think we've covered this fairly well. We had General
16 Sanchez who said yep, I issued that order, it came from my
17 headquarters.

18 And then on the next slide, there is actually an
19 important related point. It not only came from his
20 headquarters, but consistent with this notion that in the
21 era of the all volunteer army, KBR was performing, not
22 just something generally referred to as logistical support
23 services. That's what it was. But these were mission
24 critical services and General Vines made clear that
25 without KBR's assistance, this war could not have been

1 effectively fought.

2 And he's essentially saying in his own words
3 that these were sensitive military judgments because the
4 decision on these critical services was critical to the
5 success of the mission.

6 I had a reference to testimony from General
7 Sanchez. Actually, Mr. Johnson covered that. This is his
8 testimony at page 85, line 25 through page 86, line 22 and
9 again at page 88-1 through 19. I won't repeat all that
10 had been covered, but it is important that to reflect on
11 what he was talking about, health and welfare, security,
12 the pace and tempo of the war, the realities of the war,
13 the counter-insurgency, the risks of putting a landfill
14 outside the wire because every time you step outside the
15 wire, it was a combat mission. The use of resources for
16 one purpose degrading the ability of the army to fight and
17 to deploy combat resources and so on. So all of that
18 testimony I think has been fairly captured.

19 Another point that's been made is this issue
20 about the base footprint and who got to decide what went
21 there. We heard both from General Sanchez.

22 Interestingly enough, Mr. Singleton, KBR
23 employee, talked just from personal experience about
24 participating in base camp planning processes and sitting
25 and listening with his security clearance to the military

1 discuss as they were about to expand I think it was
2 Salerno -- it is Salerno -- what was going to go where,
3 where in the expanded base various services would go. I
4 think the court has heard substantial and compelling
5 testimony on that issue.

6 And then another issue that we've addressed --
7 and I have to admit when I saw this this morning that the
8 highlighting is not necessarily in the right place -- but
9 Dr. Postlewaite was asked are there policies, D.O.D.
10 policies, about what can and cannot be burned in
11 contingency environments and he said absolutely D.O.D.
12 issues those policies. And when I asked him were they
13 theater-wide, he said yes and then he corrected himself.
14 He said they apply internationally. So we see each of
15 these key decisions, method, method used, incinerators
16 versus burn pits versus landfills, location, what
17 substances could or could not be burned. In each and
18 every case, these quintessential military decisions that
19 are critical to the engagement and prosecution of the war
20 that were made on the basis of risk considerations, both
21 health and operational risk considerations were made by
22 the military and that testimony is uncontroverted.

23 Turning to what the plaintiffs have to offer on
24 these points, they largely abandon their prior witnesses.
25 You heard I think from Mr. Razi at the opening about the

1 seven witnesses that were identified in the Fourth
2 Circuit's opinion. Five of whom did not reappear in the
3 current proceedings and two of whom at the end of the day
4 did not offer testimony that essentially asserted that KBR
5 was responsible for decisions on methods or on location.
6 And this can't be overstated because the Fourth Circuit
7 really did zero in on what it characterized as contrary
8 evidence that this court in the view of the Fourth Circuit
9 should have considered more carefully and yet, here we are
10 on remand and none of that contrary evidence is now before
11 the court. The plaintiffs have failed to produce
12 so-called contrary evidence.

13 Mr. Johnson did cover -- I was going to say
14 something about the witness the court did hear from. I
15 think Mr. Johnson covered that.

16 But in general, there's nothing to refute the
17 generals. There's nothing to refute Dr. Petraeus. There
18 is no evidence that has been brought on through documents,
19 through direct examination, through cross-examination that
20 challenged the fact that only the military could fund and
21 bring incinerators into theory, that challenged the notion
22 that there was no recycling facilities available or that
23 challenged the notion that if you go outside the wire,
24 you're on a combat mission.

25 I do want to focus on one remarkable development

1 that did occur. And if we go to the next slide? It
2 appears plaintiffs have abandoned their claim that KBR
3 chose the location. This is not a small point because in
4 fact from the first complaint filed in 2008 right through
5 the master complaint, the allegation that KBR was
6 responsible for choosing the location of burn pits, which
7 is a critical issue when we think about what the, you
8 know, exposures may have been as a result of placing a
9 burn pit in the right or wrong location, it has been, you
10 know, bedrock plaintiff allegation that it was KBR. The
11 Fourth Circuit thought that was a pretty important issue.
12 It picked up on that and identified it as one of the
13 issues that needed further discussion, that needed further
14 discovery in fact.

15 Plaintiffs' opposition to KBR's motion to
16 dismiss, this comes in in I believe in early February in
17 response to KBR placing -- in response to KBR's position
18 that it was the military, the plaintiffs have placed that
19 issue of location into dispute. And as recently as the
20 prehearing conference order in late February, plaintiff
21 said nope, KBR made the decisions challenge in this case
22 and certainly one of those is the location decision.

23 We've now included on this slide, Your Honor,
24 the statement from counsel from last week calling this a
25 red herring issue. It's not a red herring issue, Your

1 Honor. It has been a core allegation of plaintiffs since
2 day one and now like their witnesses, it's gone. I think
3 we are entitled to proceed on the understanding that
4 plaintiffs have withdrawn their allegation that KBR was
5 responsible for locating burn pits at forward operating
6 bases.

7 So in lieu of actual evidence on these key
8 points, plaintiffs have attempted to erect an alternative
9 universe, how the military operates on a forward operating
10 base, that is. The two silo theories we heard. That you
11 have the commanders and you have DCMA. Again and I think
12 I heard something like, you know, when it comes to making
13 waste disposal, the decisions, it's not up to them.

14 Mr. Johnson covered all of that. It's clear that they're
15 not two silos. DCMA has part of the military. And to be
16 sure, commanding generals can make battlefield decisions.

17 DCMA is a conduit. If we go to the next slide?
18 Again I think we've seen some of this testimony already.
19 But we've made the point again and again that DCMA are the
20 conduit. They implement the commander's intent. It's not
21 a separate mission. It's the same mission. I think we
22 had additional testimony on this point. And I think we've
23 seen that before. DCMA cannot change the commander's
24 intent.

25 All right. And I guess I would point out

1 finally in this regard, Your Honor, that it is true that
2 DCMA is in the military. So if in fact the decision were
3 made by DCMA and if in fact, DCMA directed KBR to do or
4 not do certain things, that's military direction. And the
5 question is from the Fourth Circuit is was there control
6 by the military? So even under plaintiffs' theory however
7 incorrect it may be about DCMA acting as a silo, that is
8 military direction.

9 So let me summarize what we have so far on these
10 key decisions. Plaintiffs have alleged KBR negligently
11 made key waste management decisions. The Fourth Circuit
12 said those are going to be outcome determinative of the
13 PQD control test. KBR has presented overwhelming and
14 essentially uncontroverted evidence that the military made
15 each and every one of those key decisions. Plaintiffs
16 so-called contrary evidence has disappeared.

17 So based on those, I think there are some
18 inevitable legal conclusions that bear directly on the
19 issues under the political question doctrine. If
20 plaintiffs assert that KBR made the key decisions
21 negligently, if the evidence demonstrates that the
22 military made those key decisions, then in fact plaintiffs
23 are challenging military decisions. That, of course, is
24 impermissible under the political question doctrine.

25 And let me just say one more thing before we go

1 to the red slide. This irrefutable conclusion brings down
2 the hammer of the political question doctrine because the
3 court has to consider how KBR would try this case based on
4 those facts. It's clear KBR will cite to the overwhelming
5 evidence that it was the military that made the allegedly
6 negligence decisions, which in turn would require multiple
7 trial courts to sit in judgment and to second guess these
8 sensitive military judgments.

9 So I would submit, Your Honor, right now -- I
10 love the metaphor of "the hammer falling" because that
11 fact is now in this case. It's now and forever in this
12 case. It cannot be extricated from this case that there
13 is a separation of powers problem. That there is a
14 conflict if the judiciary starts to second guess military
15 decisions as it would have to do under the facts that are
16 clear. And on this basis alone, it's clear that
17 plaintiffs have failed to meet their burden under Section
18 12(b)(1) and therefore, these cases must be dismissed.
19 And I don't know about your Latin background, Your Honor,
20 but where I come from, we call that QED. It is thus.

21 I do want to say a word because this is an often
22 overlooked aspect of the political question doctrine.
23 Although in fact it was the very first question Your Honor
24 posed on Friday afternoon, late on Friday afternoon and
25 that is the question of the Taylor Factor 2, the national

1 defense interest question. That is whether national
2 defense interests are inextricably intertwined with the
3 key waste and water services that are at issue here. And
4 as to that, Your Honor, I actually think this is a pretty
5 straightforward issue.

6 General Ricardo Sanchez was asked was KBR work
7 in your estimation important to the war effort. Not just
8 important says he, it was absolutely essential and a key
9 component of our readiness and capacity to win. And
10 General Vines reflected very similar thoughts. I think
11 this is the same as the quote I had earlier, that "the
12 services provided by KBR were critical" and he includes
13 specifically both waste and water and we couldn't have
14 done this without them. I think the question of whether
15 these national defense interests are intertwined with
16 those services has been answered directly and conclusively
17 by the generals.

18 So let me turn now to the second argument. You
19 will recall, Your Honor, I said that we discern four
20 claims by plaintiffs. The first being the key issues
21 which we've now addressed. Let me turn to the so-called
22 what-not-how argument that plaintiffs have made and they
23 have made that repeatedly again in the history of this
24 case. It's an important issue. The Fourth Circuit
25 mentioned it as well. But the evidence makes clear at all

1 levels that in fact the military told KBR not only what to
2 do, but how to do it at the very broadest levels, for
3 example. At the very broadest levels where if you look at
4 how LOGCAP III was structured, you see that the military
5 decided which services KBR would provide. They decided at
6 which bases KBR would provide those services. And at any
7 given base, take burn pits as an example or even the
8 ROWPUS, the water ROWPUS as examples. You will find some
9 bases where the military is performing those services and
10 others where KBR is performing those services and rest
11 assured, Your Honor, it was the military that made that
12 decision.

13 We heard testimony from the generals. We heard
14 testimony I think from Roger Singleton regarding this
15 issue that the military controlled the movement of men and
16 material in theater. So at the very broadest levels, KBR
17 is being controlled by the military.

18 Sort of an intermediate level is at the key
19 decision level and on the key waste decisions -- I don't
20 want to be too redundant here -- but we see, of course,
21 that the military made the key decisions on use. They
22 continually re-assessed and reaffirmed that determination,
23 location and the plastic water bottles issue. And indeed
24 on incinerator, they made all of these decisions.

25 Let me just -- I'm going to go on to the more

1 granular level of control, but let me just make this
2 observation. On waste management, the military didn't
3 just say to KBR, conduct waste management. It said to KBR
4 use burn pits. On water, the military didn't just say
5 produce water. The military said follow TB Med 577 where
6 you will find that the method of water production is these
7 reverse osmosis water purification units or ROWPUS. So we
8 have a level of -- a degree of control that I think
9 already meets what the Fourth Circuit was looking for, but
10 indeed, the level of control is much more granular.

11 So if we go to that next level, we find control
12 through the contract directives. Again, Mr. Johnson went
13 through this at length. The operative points that I
14 wanted to take away and if the court recalls that nice
15 circle with weaving colors, you will recall that the
16 military was involved in the contracting process at
17 multiple steps along the way.

18 The process started with the supported unit
19 deciding what its needs were. Critically, the military in
20 several places along that pathway decided whether it
21 agreed with the cost estimates that were provided and if
22 it didn't, that's an exit ramp. And more importantly, the
23 military had to decide through these acronyms, JARB and
24 CARB, these acquisition review boards whether funds were
25 available. And make no mistake, there were times when

1 that was an exit ramp because the funds weren't or
2 somebody figured out let's not let the contractor do that,
3 let's let the military do that instead. All of those were
4 control decisions being made by the military.

5 So we also find that the military was
6 responsible for conducting health assessments to re-assess
7 and potentially reaffirm the decisions that it makes, the
8 directions that it gave. And in that regard, we had
9 multiple testimony. We had Dr. Postlewaite, who made
10 clear that there were policies that required commanders at
11 the base level to follow through on these health
12 assessments and that this was a non-delegable
13 responsibility. We had Dr. Postlewaite testifying further
14 that in fact that testing was done. That there was
15 extensive air quality testing performed by the military,
16 assessed by the military and decisions taken on the basis
17 of those tests and their results and he indeed informed
18 the court regarding the extensive test and the
19 comprehensive testing that was done at Balad where they
20 took a long, hard look at the question of whether burn
21 pits were posing health risks. And at the conclusion of
22 that, the military continued to direct the operation of
23 burn pits.

24 We've talked also about the oversight. I think
25 Mr. Johnson covered this in some depth. I'll just throw

1 up one slide that reflects the fact that Mr. Singleton who
2 was at multiple bases if the court will recall, that he
3 was in Afghanistan at several bases and in Iraq at several
4 bases covering really almost the entirety of the period in
5 question here. And he talked about the process. Then he
6 said yes, there were times when the auditors, be they DCMA
7 or the supported unit technical representatives would say
8 we have found something that we want to talk about. We're
9 not happy about it or we think that there is a different
10 or a better way. Some of that was kind of a informal
11 process of resolving the issues. But there was a very
12 formal process. When the military decided we are not
13 pleased with the way KBR's performing a particular
14 service, they would issue a formal document. It's called
15 a Corrective Action Request and those would all have to be
16 addressed and resolved. And what Mr. Singleton said and
17 others in deposition testimony have said, yeah, if we got
18 a C.A.R. from DCMA, we resolved it. We had to do what the
19 customer wanted. And if we heard from DCMA that we needed
20 to change, we did.

21 And then finally, Your Honor, on this sort of
22 this granular level, you heard and saw evidence on the
23 award fee process and the military used the award fee
24 process to ensure that KBR was performing in a manner that
25 met the military's needs. All of this from the key

1 decisions to the most broadest level of decision making on
2 what surface to the key waste decisions and water
3 decisions down to this granular level represents a
4 pervasive level of control by the military over KBR's
5 performance of waste and water services. And I think
6 indeed, Your Honor, that meets the Fourth Circuit's
7 concerns on those issues.

8 Plaintiffs have thrown this what-not-how
9 argument and they show a document here or there. But they
10 kind of fall back on the very kind of semantic cataloging
11 that the courts have said is not the appropriate way in
12 which the political question doctrine issues should be
13 addressed. They said look at the contract. Look at the
14 army manuals. Yes, of course, they're relevant. But
15 plaintiffs would have the court look at these high level
16 documents and say therein lies the answer. Well, it
17 doesn't. What they don't want to look at what was
18 happening on the ground. So they would say, for example,
19 that the very fact you have claims based on whether a
20 contractor has complied with this contractual duty does
21 not implicate a political question. Well, if the mere
22 claim that a contractor violated its contract were enough,
23 none of these contractor on the battlefield cases
24 including this one would require district court much less
25 appellate review. I think Mr. Russell covered that at

1 length.

2 Plaintiffs would say, well, KBR is not part of
3 the military chain of command. well, that's true. It's
4 true by statute. If that were a determinative factor, why
5 are we here, why did we go through discovery?

6 They would say well, if KBR is serving as a
7 force multiplier, can't be under the plenary control of
8 the military. well, that's nonsense. You know, in
9 Carmichael, we were driving convoys. We were a force
10 multiplier. That simply is not a real legal standard.
11 It's made up. And there's others that are not on this
12 slide.

13 The notion that KBR's responsible for
14 supervising its employees and its subcontractors, how can
15 that possibly be outcome determinative or even relevant?
16 And I think Mr. Russell quoted at length from Carmichael
17 and there was a great quote about the fact that the fact
18 that the driver had some control over the wheel doesn't
19 mean that the military wasn't controlling that function of
20 providing convoy service. That that service just like the
21 burn pits, just like the water service is pervaded by
22 sensitive military decisions and as a result, any
23 consideration of those issues has to be looked at at that
24 granular ground level and not left simply to this kind of
25 semantic cataloging.

1 All right. There's two issues left. One will
2 be real quick. The third issue that I identified at the
3 outset was the violations issue, what plaintiffs have
4 repeatedly called the central tenet of their claims, the
5 core of their complaint. As often as plaintiffs have
6 tried to bring forward that issue, equally often has this
7 court said since the CMO that Mr. Russell referred to not
8 for today. That's for another day.

9 And I just want to make the point that this
10 wasn't an arbitrated decision by the court. There is a
11 good reason for excluding the so-called violation issues
12 because as noted on the previous slide, this by itself,
13 claims that a contractor violated its contract rendered
14 contractor on the battlefield cases justiciable, well,
15 this court and these litigants have been wasting an awful
16 lot of time and money if that were true. And it's also
17 true that when you think about it and maybe this was the
18 point Mr. Russell was getting at. But I'll put it my way,
19 it turns the concepts of threshold jurisdictional issues
20 on its head. I think this is the way it goes. In order
21 to determine whether the court has jurisdiction to
22 adjudicate the merits of a case, the court must first
23 adjudicate the merits of the case. So the third issue of
24 being violations, we'll move past that.

25 The fourth issue that I identified, Your Honor,

1 at the outset I think this completes plaintiffs' claims is
2 the question that Mr. Johnson addressed in part about
3 whether KBR operated without authorization, indeed in some
4 of the writings, it is stated that KBR operated without
5 the knowledge or authorization of military personnel. And
6 again in part it's because if I can't show you this
7 document that absolutely makes clear that I'm authorized,
8 it means per force that I'm not authorized. Unsupported,
9 contrary to the evidence. We've shown the documents. And
10 Mr. Johnson explained that, yes, at some bases, we have
11 these contract directive documents. At other bases, we
12 have the task orders. As the wars dragged on, there were
13 new and expanded services and there, you're more likely to
14 see a new contract directive document.

15 So I feel we've got a forest-in-the-trees
16 problem here, Your Honor. Yes, it's probably true there's
17 not a specific document for every single burn pit that KBR
18 operated. Doesn't mean that there isn't a broad contract
19 document, but there's not one for a given base camp. I
20 would point out it was a war. I would point out that
21 every document that was generated be it by KBR or by the
22 military did not necessarily survive the heat and
23 degradation of the environment, the missile attacks that
24 you heard testimony about. But more than anything else,
25 Your Honor, talk about red herring issues, let's just step

1 back because first of all, we have witness testimony
2 supporting the notion that we were authorized. And I
3 think as Mr. Johnson just pointed out, there is a lack of
4 testimony coming from plaintiffs to the contrary and we
5 can't overlook this issue because isn't it clear, Your
6 Honor, that if in fact KBR was operating without
7 authorization, the indirect evidence, there's not a
8 document, that's where plaintiffs would come from.

9 I would have thought plaintiffs would have
10 brought to this court hard evidence, a witness that they
11 would rely on. They were allowed to bring 20 witnesses.
12 They only relied on 19. Not one has come forward and said
13 KBR operated without authorization. And I would think
14 that if, you know, there's almost a decade, there's two
15 war theaters, somewhere out there in all the places they
16 said we operated as sort of a rogue operation, somebody
17 would have come forward and said, yes, I saw it, KBR was
18 acting without authorization. Not a single commander.
19 Not a single battlefield soldier said so. And it's no
20 surprise, Your Honor, because it simply is not true.
21 There is no evidence to support that baseless allegation.

22 And I have to say there is a dollop, a large
23 measure of common sense that I would bring to all of this.
24 I would say, Your Honor, that reflecting on plaintiffs'
25 allegations that we operated burn pits and they were open

1 and notorious and that flames billowed hundreds of feet
2 into the air says they in their complaints. Plaintiffs'
3 hypothetical is that these burn pits that were operated in
4 plain sight, that were clearly visible nevertheless went
5 unnoticed by the base commanders and by the mayor cell.
6 They went unnoticed by the ACOs and the QARS and the CORs
7 who failed to make a connection between the monitoring and
8 auditing they were performing of these services and the
9 fact that KBR was not authorized to do it. Mr. Johnson
10 showed you the form that was used by the inspectors at
11 whatever frequency that said -- that had checklists about
12 all of this. Somehow they failed to make this connection.
13 This notion that the absence of documentation means
14 something is a fact-free conceit that lawyers have
15 concocted to try to explain away the obvious point that
16 KBR was given military direction. There is no factual
17 support and there is no legal support.

18 Let me tie, Your Honor, all of that back to a
19 few core political question doctrine points. It bears
20 repeating as Mr. Russell said that this is a very unique
21 case. Actions and policies at issue across two broad war
22 theaters, almost a decade of active war and hostilities.
23 This case is like no other.

24 It also bears repeating that plaintiffs have had
25 access to an extraordinary volume of evidence that is

1 before the court involving contract documents and emails
2 and so on. And despite that massive volume of evidence,
3 plaintiffs have not brought forward any evidence that
4 would support their burden of establishing subject matter
5 jurisdiction. These evidence-free allegations and these
6 precedent-free legal theories are not a substitute for
7 evidence.

8 And finally, to round out this analysis,
9 plaintiffs have wholly ignored the principles of the
10 separation of powers. They ignore how this case would be
11 tried. They ignore the tremendous burden that would be
12 placed on the military if these cases were to proceed to
13 trial. We've had dozens of military witnesses deposed and
14 brought to testify on the threshold issue. Imagine what
15 that number would be if they were required to testify at
16 multiple cases around the country. And they avoid the
17 obvious point that they are in fact challenging military
18 decisions.

19 Plaintiffs argue, well, you know, KBR was doing
20 all these violations and the problem was that DCMA wasn't
21 doing its job well. That itself is a political question
22 doctrine problem. They are criticizing the military which
23 after all is what DCMA is.

24 Your Honor, I think at the end of the day, there
25 can be no question that just looking at the political

1 question doctrine alone at the 12(b)(1) motion that we
2 have filed and at plaintiffs' burden, that plaintiffs have
3 failed to sustain that burden. These cases are indeed
4 non-justiciable under the political question doctrine.
5 Thank you, Your Honor. Pleased to take on any questions.

6 THE COURT: No. I'm fine.

7 MR. MATTHEWS: Your Honor, I may have failed,
8 Your Honor, and I apologize, to hand up the slides.

9 THE COURT: Okay. Hand them up. I think I got
10 them. Do you have -- anybody else going to be presenting
11 arguments at this point?

12 MR. RUSSELL: Yes, Your Honor.

13 THE COURT: You're going to present them after
14 we take a 15-minute recess.

15 MR. RUSSELL: Absolutely, Your Honor.

16 THE COURT: All right. Thank you. And ignore
17 that clock. It will be 11:25.

18 (Recess.)

19 MR. RUSSELL: Thank you, Your Honor, and I've
20 got some slides here which I can pass up if I may.

21 THE COURT: Okay.

22 MR. RUSSELL: And, Your Honor, I want to turn
23 now to our argument on combatant activities preemption. I
24 intend to be as brief as possible. I recognize that we've
25 been taking up a lot of the court's time this morning.

1 And so I may not cover each of these slides. But I do
2 want to cover the main points relevant to our argument.

3 And, Your Honor, where I would begin with is the
4 Fourth Circuit opinion and the notion that our preemption
5 defense is a very broad one. The rule of law adopted by
6 the Fourth Circuit is a broad preemption rule. And I
7 would submit that the reason why this is a broad
8 preemption rule is that the issue properly described is
9 not really one of removing state tort law from the
10 battlefield. It's really one of whether to inject state
11 tort law principles to the battlefield because this is an
12 arena as reflected in these quotes from the Fourth Circuit
13 opinion where there is no history of state tort law
14 existing and regulating conduct on overseas battlefields.
15 There is no history of the activities at issue in these
16 suits being subjected to state tort law concepts.

17 And so we get to further on in the Fourth
18 Circuit opinion, what is the measure of integration and
19 control? We've covered this. It comes down to whether
20 these activities stem from military commands. And so the
21 question as we've distilled it here really comes down to
22 the degree of control and the extent of immigration.
23 These are related concepts as the Fourth Circuit opinion
24 recognizes. And again, if we're asking the question
25 whether or not these challenged activities stem from

1 military decisions or from the sole discretion of KBR, the
2 obvious starting point is what are the challenged
3 activities? We know these well. They are the use of burn
4 pits, the location of burn pits, whether to bring in
5 incinerators, the use of recycling services, the burning
6 of plastics. Those are the challenged activities.

7 And very quickly, Your Honor, this is very clear
8 from the record before this court, there is no genuine
9 dispute. The military made all the key decisions, all of
10 the conduct at issue, all of the challenged conduct stem
11 from quintessential military judgments. That includes the
12 decisions related to burn pits as well as the decisions
13 related to the manner and methods of processing water as
14 Mr. Johnson and Mr. Matthews alluded to.

15 I have some slides that summarize as key
16 evidence on these points. I think at this stage, Your
17 Honor, these points are very well established. You've got
18 it in the slide deck and I'll just flip through these very
19 quickly.

20 And I want to get to -- given that I think that
21 the evidence is so clear that the military made these key
22 decisions and so clear that the challenged conduct stems
23 from these quintessential military judgments, I want to
24 get to the arguments that the plaintiffs raised in
25 opposition to our motion. The first one which has already

1 been dealt with here today is that KBR had no
2 authorization. And the entirety of the plaintiffs'
3 evidence on this issue, Your Honor, is their allegation
4 that there is a lack of documentation. There is nothing
5 else. There is undisputed testimony. There is testimony
6 in this case from generals, from contracting officers,
7 from the Defense Contract Management Agency itself. Not a
8 single witness has supported this notion that KBR was
9 performing unauthorized burn pits.

10 What we have here I think Mr. Matthews described
11 it quite well as creative lawyering a decade after the
12 fact. It is a post hoc unilateral contract interpretation
13 that has no support in the record. And I would note, Your
14 Honor, when it came to the time for the plaintiffs to tell
15 this part of their story, what we heard, Your Honor, was
16 argument from counsel, not testimony from any witness.

17 Moving next to the -- another argument that the
18 plaintiffs raised in opposition to our preemption defense,
19 they argue that this contract was a performance-based
20 contract. And on that ground, they say by definition, our
21 preemption defense doesn't work.

22 And I want to go back to the derivation of that
23 argument which is in the Saleh decision. And if you read
24 Judge Silverman's decision in the Saleh decision, you'll
25 see that he wrote that there might be circumstances. He

1 was somewhat dubious of this. But he said we recognize
2 that there might be a circumstance where a service
3 contractor is supplying services in such a discreet
4 manner. He said perhaps even in a battlefield context.
5 Such a discreet manner that those services could be judged
6 separate and apart from combat activities of the U.S.
7 military.

8 And according to the D.C. Circuit, a contractor
9 does not -- would not be entitled to the preemption
10 defense if what's going on in the lawsuit is that the
11 plaintiffs are challenging the sole discretion of the
12 contractor rather than the government's discretion. Your
13 Honor, whatever application that potential exception to
14 the broad preemption rule has it's not here. Here what we
15 have is a clear case in which KBR's services could not
16 possibly be judged separate and apart from the military's
17 wartime decisions. What we have here is plaintiffs
18 directly challenging sensitive military judgments. So we
19 would submit that whatever application this exception to
20 the broad Saleh rule has, it cannot be here. It cannot be
21 with this massive record showing the pervasive military
22 decisions and judgments that both control KBR's conduct
23 and pervaded all aspects of the claims here.

24 Your Honor, this has been touched on, but I want
25 to address it again. The notion that plaintiffs can

1 defeat our preemption motion by establishing that KBR is
2 not in the chain of command. Quite simply, that's not the
3 standard and the easiest way that we know that this is not
4 the standard is by looking at the Fourth Circuit opinion
5 which has already rejected this argument. So says the
6 Fourth Circuit, even if government contractors can't
7 qualify as combatants, this fact is irrelevant. The Saleh
8 test does not require private actors to be combatants.
9 And this is something of an obvious point if you think
10 about it because by law, no contractor is in the chain of
11 command. If the Saleh court was intending to create a
12 broad preemption rule applicable to government contractor
13 activity, it would make no sense that they would require a
14 contractor to be something that by law, it could not be.
15 So that's simply not the standard.

16 Moreover, Your Honor, and I think I've alluded
17 to this, the plaintiffs' proposed exception, this notion
18 that because KBR cannot receive direct orders from a
19 military commander because KBR is not technically in the
20 chain of command, if that were the -- an exception to the
21 rule, it would apply --

22 THE COURT: They're not in the military base
23 chain of command. The actual base.

24 MR. RUSSELL: I'm sorry, Your Honor?

25 THE COURT: The KBR personnel are not in the

1 direct chain of command of the forward operating base
2 commander.

3 MR. RUSSELL: Correct, Your Honor.

4 THE COURT: I understand that. I think what
5 you're making a point is is that there's multiple chains
6 of command. It doesn't have to be that particular chain
7 of command. These people with the contracting authority
8 are giving orders. I mean they are --

9 MR. RUSSELL: They are certainly giving
10 directions to the contractor. There is a term of art out
11 there of giving orders and by law, a contractor, a
12 civilian cannot receive an order from a military person.
13 But in effect, as Your Honor alluded to, the military
14 person, whether it's the contracting officer or if it's
15 General Sanchez through the contracting officer is
16 affecting the commander's intent, affecting the
17 commander's orders through those channels. And if it were
18 the case that a contractor had to be in a position of
19 receiving direct orders as that term of art is used, that
20 that rule would eviscerate this defense because no
21 contractor by law can receive an order. But as you
22 indicated, Your Honor, they certainly do receive
23 directives including, you know, most relevant here, the
24 direction to use burn pits.

25 THE COURT: Those are directives from military

1 in the contracting office.

2 MR. RUSSELL: Those are directives from
3 militaries in the contracting office who are effecting the
4 intent of the military commander. And so as Mr. Matthews
5 alluded to, one, this is just a conduit through which the
6 operational commander is conveying his order. And, two,
7 the contracting personnel, the DCMA, the Rock Island Army
8 Sustainment Command, they are all part of the D.O.D.
9 They're all part of the military. There's only one
10 mission here. The contracting official who's giving those
11 directions has no business changing the commander's
12 intent. If the commander says burn pit, there's no
13 authority to change that at the contracting level.

14 And so, Your Honor, just to getting back to this
15 notion that their exception was follow the rule, the
16 plaintiffs' counsel has acknowledged that these rules that
17 they say render our preemption defense nonapplicable,
18 these are facts that apply in all government contracts.
19 They apply to every situation where the government is
20 going to use a contractor. So if adopted, as we state
21 here, their argument would really render this supposedly
22 broad preemption rule that the Fourth Circuit has
23 emphasized is broad, a nullity.

24 Your Honor, I think we've addressed many of the
25 core points supporting our preemption argument already and

1 I want to turn to a few that haven't really been given as
2 much attention in the brief, but are nonetheless relevant.
3 The first is the litigation burden on the military and
4 this was a matter that the Fourth Circuit identified as
5 relevant to the preemption analysis.

6 The Fourth Circuit said hauling government
7 contractors into court in proceedings that would question
8 military decisions, that's going to distract government
9 personnel from their tasks. This is not a small thing.
10 In this case, Your Honor, through jurisdictional discovery
11 alone, we've seen depositions of 25 military personnel.
12 We've seen multiple Rule 30(b)(6) depositions taken of
13 government agencies. We have seen extensive document
14 discovery against the United States government.

15 If these cases were allowed to proceed, it would
16 place an enormous burden on the government. Moreover,
17 what would happen is that this private litigation would
18 effectively divert vital resources otherwise committed to
19 our national defense to litigating a private tort case.
20 And while we think that may not be the most important
21 reason why these cases are preempted, it is certainly a
22 data point. It is certainly something that the Fourth
23 Circuit indicated that should be considered in the
24 analysis.

25 I have a final set of slides here. I think one

1 or two more. And the first one is simply to point out
2 that preempting these lawsuits, keeping state tort law off
3 the battlefield does not leave the plaintiffs in this case
4 without remedies.

5 Now we obviously have disputes about causation
6 injuries, anything like that. But the simple point here
7 is plaintiffs, veterans, contractors serving overseas,
8 they have -- the political branches of our government have
9 in place remedies for those individuals to the extent that
10 they have sustained injuries. And in fact, as Your Honor
11 may be aware, there is congressional attention to these
12 matters. There is a burn pit registry out there. The
13 political branches are doing their job.

14 THE COURT: There were bills introduced in
15 Congress in February.

16 MR. RUSSELL: Yes, Your Honor.

17 THE COURT: Bipartisan bills in both the Senate
18 and the House.

19 MR. RUSSELL: And that, Your Honor, I would
20 submit is the political branches of our government doing
21 their job and overseeing these matters as they should.

22 And likewise, it is not as if in the absence of
23 state tort law, KBR's conduct goes completely unregulated.
24 It's not the wild wild west. There are many, many
25 mechanisms. There is an entire regulatory regime that KBR

1 is subjected to that includes contractual, civil,
2 administrative and even criminal law sanctions where
3 appropriate.

4 And I think this is a really important point,
5 Your Honor. There is no evidence, zero evidence in this
6 case that the military chose to utilize any of those
7 mechanisms to reprimand or remedy any of the challenged
8 conduct here and I think that only underscores how
9 inappropriate it would be for a court for the judicial
10 branch, for a state through its tort law to come in and
11 try to second guess and inject their standards on the
12 conduct at issue. It's really a second level of a
13 political question. It's really a second level of an
14 offense to federal interest because not only are
15 plaintiffs seeking to scrutinize the military decision to
16 say use burn pits, but they're also seeking to scrutinize
17 the military decision to sanction, authorize, approve and
18 commend KBR's services in that regard.

19 And at the bottom here I'd just note that this
20 is not an idea I came up with on my own. This is in fact
21 language that comes from the Fourth Circuit's opinion
22 wherein it noted that allowing these claims to proceed
23 could interfere with the federal government's authority to
24 punish and deter conduct by its own contractors. In other
25 words, let the military regulate the conduct on its own as

1 it sees fit.

2 And my last slide, Your Honor, is just to
3 speculate on what the world would look like if the
4 plaintiffs could successfully inject state tort law in
5 this arena. And what we would have is we would have a
6 duty for contractors to overrule the military's chosen
7 waste method. We would have a state or a non-federal duty
8 for contractors to decide the best location for burn pits
9 on military bases.

10 You heard from the commanders. That would
11 render the military effectiveness, it would really not
12 just hamper it, it would be incredibly detrimental to the
13 military's effectiveness in choosing how to wage war. We
14 would have a duty for contractors to say, you know, we
15 appreciate that you don't want incinerators, but we're
16 going to bring them in any way and you're going to have to
17 pay for them. It would institute a duty for contractors
18 to refuse burning items, such as plastics despite military
19 direction to do so in the midst of a war.

20 And at its core what this case would require if
21 these duties existed would be for private contractors
22 performing essential functions for the military inside
23 active war zones to pick and choose when a state or a
24 non-federal duty required it as a contractor to go around
25 and warn these soldiers about battlefield risks, risks

1 that their commanders deliberately considered and
2 accepted. And, Your Honor, we submit that that world,
3 that world does not exist. It should not exist. These
4 claims at their core seek to impose standards, state tort
5 standards onto conduct that stems from and in some
6 instances is in fact sensitive military judgments. And,
7 Your Honor, we don't think that state tort law has any
8 role there and we submit that these suits are preempted.
9 I'm happy to answer any other questions.

10 THE COURT: No. Thank you very much.

11 MR. RUSSELL: My colleague, Mr. Razi, has a few
12 concluding remarks to make.

13 THE COURT: All right.

14 MR. RAZI: Thank you, Your Honor.

15 As you can see from the thorough presentations
16 by my colleagues and the presentations over the course of
17 the last several days and indeed the extensive briefing
18 and factual submissions that have been made prior to this
19 hearing, these cases are extremely important to KBR. I'm
20 sure they're important to plaintiffs and their counsel,
21 too. But they are exceedingly important to KBR.

22 KBR is being accused here not by the government,
23 not by the military, but by plaintiffs and their lawyers
24 of failing to live up to its obligations to the military.
25 Serving the military is at the very core of KBR's mission.

1 The evidence shows that KBR did that here. KBR
2 served the military. It acted in accordance with military
3 directives, including directives that were made and that
4 we heard about in this courtroom literally in the heat of
5 battle, in the throws of war. KBR and its personnel
6 suffered more than 1,000 casualties doing this work with
7 the military.

8 We want to thank the court for the care and
9 attention that it has devoted to these cases, including
10 during the course of the last several days.

11 While KBR may have wished earlier in the
12 proceedings that the discovery had been less costly, less
13 burdensome, less intrusive than it was and than the court
14 ordered, I think it is fair to say that all the parties
15 and all of us now benefit from the full and complete
16 record that has been developed based on the instructions
17 and the orders of this court.

18 With all the documents, six million pages or so
19 and all the witness testimony from dozens of witnesses
20 that has been developed in response to this court's
21 orders, we, all of us, can now reach conclusions with
22 confidence. Matters that may have seemed intuitive four
23 years ago, may have seemed to be matters of common sense
24 at the outset of these cases have now been established by
25 literally overwhelming evidence.

1 The plaintiffs' claim to the Fourth Circuit that
2 there was evidence that KBR was the one, not the military
3 that decided to use burn pits. All of the documents and
4 all of the testimony emphatically refute that claim. So,
5 too, regarding the contention about location which you've
6 heard so much about. All the documents and all the
7 testimony disprove that contention. So we have come quite
8 a long way.

9 The plaintiffs have now all but abandoned the
10 arguments that they made before the Fourth Circuit. But
11 of course, they have new arguments and those arguments
12 have been exposed as wrong during this hearing.

13 Counsel claimed in his opening statement, for
14 instance, that plaintiffs are only questioning KBR's
15 decision and he also admitted that the location issues are
16 generally controlled by the military. But those
17 statements ignore and they are directly contradicted by
18 indeed the plaintiffs' own master complaint. The
19 operative complaint in this case blames KBR for things
20 that we all now know having seen the evidence that were
21 military decisions. No debate about that.

22 Likewise on the eve of the hearing and in
23 opening statement, plaintiffs contended and they continued
24 to insist this that and I'm quoting "the military never
25 gave KBR across-the-board authorization or direction to

1 use surface burning as a means of waste disposal." That
2 was argument. But that's all it was. That was lawyer's
3 argument. But we now have evidence and the evidence at
4 this hearing actually showed the opposite. The very first
5 witness testified quote "we issued the order to KBR and to
6 all forces in the country to use burn pits as a means of
7 waste disposal during the occupation period." So the
8 lawyer's argument on the one side and then on the other
9 side, we have the undisputed evidence from Lieutenant
10 General Sanchez.

11 But to allow these cases to go forward, the
12 court -- it's very clear, what the plaintiffs are asking
13 the court to do is to discredit this clear and unequivocal
14 testimony and other clear and unequivocal evidence from
15 the commanding generals in Iraq and other credible
16 witnesses.

17 And before sitting down, I'll just remind the
18 court of where we began on Thursday morning and that is
19 General Vines' testimony. He's not a lawyer. But he
20 sensed from the questioning and from the tenor of
21 plaintiffs' approach what they were trying to do. And
22 what he said is well known now that what he thinks the
23 plaintiffs were trying to do is to impose peacetime
24 criterion on combat operation. Fortunately, I think we're
25 all grateful the law does not allow that. Because these

1 cases directly challenge sensitive military judgments
2 regarding war, the court lacks jurisdiction under the
3 political question doctrine. Because these cases attempt
4 to impose peacetime criterion, state tort laws on a war
5 conducted in the most hostile environment halfway around
6 the world led by the military, they are preempted by the
7 combatant activities exception to the Federal Tort Claims
8 Act. For those reasons, the cases should be dismissed.
9 Thank you, Your Honor.

10 THE COURT: All right. Thank you. All right.
11 Let me hear from the plaintiffs.

12 MR. LEDLIE: Thank you, Your Honor.

13 Your Honor, you just heard that Colonel Damon
14 Walsh said that General Sanchez was not a member of the
15 Defense Contract Management Agency, but DCMA communicated
16 General Sanchez's orders to KBR. You heard a lot about
17 Colonel Walsh and statements about what the contracting
18 arm of the military did with respect to communicating
19 General Sanchez's orders to KBR.

20 But, Your Honor, you have been provided evidence
21 in this case and I need to show you what Damon Walsh had
22 to say because this is the keystone of their case. That
23 General Sanchez who was there for a limited 14-month
24 period somehow gave unlimited authorizations that trumped
25 every contract document and every contract principle that

1 exists in the military.

2 Gina, can you pull up walsh 139, 5 through 16 --
3 I'm sorry -- 1 through 16?

4 And I'll note, Your Honor, that this is the same
5 citation for the premise that General Sanchez's orders
6 were communicated by DCMA to KBR.

7 Colonel walsh said, And if you're going to
8 correct a contractor on how to carry out a contract,
9 that's a contracting function, isn't it, and it would be
10 inappropriate for General Sanchez to tell KBR how to do
11 it, how to carry out the term of a contract, wouldn't it?

12 It would be inappropriate for General Sanchez or
13 any non-acquisition official to give directions to a
14 contractor. His or her mechanism for doing that is
15 through the acquisition work force.

16 But they didn't include this, Your Honor, and
17 this is crucial because the contracts and the contracting
18 process, Your Honor, is the only means of control that the
19 military has over a contractor.

20 You never saw through the acquisition work force
21 authorization for burn pits?

22 I never personally saw that. No.

23 Now this -- if General Sanchez's order was
24 really communicated through KBR through the only entity
25 that could do so, Defense Contract Management Agency,

1 Damon Walsh is there, he doesn't recall that happening.
2 Your Honor, this is significant because you've talked at
3 times in this case about the lawyers not playing in the
4 sandbox very well. Your Honor, there's been some
5 misrepresentations made here today and we need to correct
6 them because in order for Your Honor to properly evaluate
7 this case, you need to look at all the evidence.

8 Gina, can we pull up the next page on page 70,
9 lines 11 through 20?

10 Colonel Walsh was asked, Do you have any -- do
11 you recall any specific instance in which you were
12 informed that KBR was authorized to use a burn pit as the
13 default method of waste disposal at a site in Iraq?

14 This is the person who said -- who they claim
15 communicated through DCMA that information.

16 No.

17 Did you ever see any written authority expressly
18 authorizing KBR to use burn pits in Iraq?

19 Colonel Walsh: There at the time? DCMA, the
20 contracting arm? The commander? No.

21 Page 81-9 through 85-22. This is their witness
22 that they say despite the fact that the contract documents
23 which Your Honor has seen do not say use burn pits that
24 somehow, okay, no, DCMA though communicated that.

25 THE COURT: Well, is there any question though

1 that the military made the decision whether it may be in
2 these contract documents or not, that they wanted the use
3 of burn pit because that was in the judgment of the
4 military commanders necessary as the means of disposing of
5 waste because of battlefield conditions? Is there any
6 dispute about that?

7 MR. LEDLIE: Yes, Your Honor. Absolutely.

8 THE COURT: Well, tell me what fact there is in
9 this record -- not the contracts -- that indicates that
10 the military didn't want to use burn pits.

11 MR. LEDLIE: Your Honor, let me refer you to
12 this very testimony. First of all, Your Honor, as you
13 know, we've -- there are two silos -- and I'll get to
14 this -- between the contracting arm and the battlefield
15 commander. And the only arm of the military that
16 instructs a contractor like KBR on what they can do, what
17 the standards are for their performance is the contracting
18 arm and that can be done through the contract documents,
19 yes, Your Honor, also through their officers, but it would
20 have been reduced to writing.

21 But I asked did DCMA and AMC specify the method
22 of performance? So did they tell them that they should
23 use burn pits in fulfilling the military's requirements
24 and I want to understand the level of specificity or the
25 level of specificity you specify as to method of the

1 performance of waste disposal? And there was a
2 suggestion, Your Honor -- to answer your question, Your
3 Honor, there were -- there was a military decision that
4 was made by the combat command that when military forces
5 under the combat command were handling waste management
6 services in Iraq during certain -- during the vast
7 majority of the war, they did elect to use burn pits.
8 That is because, Your Honor, the military does have
9 limited resources and as multiple witnesses testified,
10 they don't have the corps competencies. But when they
11 bring in a civilian contractor, a subject matter
12 specialist with greater expertise and they specify in a
13 contract what the standards are, that is the military
14 decision at issue. Those --

15 THE COURT: If I recall General Sanchez's
16 testimony, he indicated that in battlefield conditions,
17 the military has the capability with its own forces for a
18 period of about thirty days to provide waste management
19 and water supply services itself. And that rather than to
20 tie up all the military personnel doing that, they then
21 bring in KBR to replicate what those military personnel
22 would be doing otherwise. Is that correct?

23 MR. LEDLIE: No, Your Honor. That was General
24 Vines.

25 THE COURT: I'm sorry. It was Vines. I

1 misspoke.

2 MR. LEDLIE: Right but that was at a different
3 time in the war and you do have to look at timeframes
4 here. That was after the surge when we had a much larger
5 force there. General Sanchez actually said that during
6 his early time period in Iraq, it was the military that
7 was handling their own waste management. In fact, he
8 couldn't tell you when at all. I asked him can you tell
9 me when KBR ever provided any waste disposal functions in
10 Iraq and he said I really can't tell you, I don't know, I
11 don't want to -- he used the term a S.W.A.G. which I had
12 to look up. But it's a wild guess, Your Honor.

13 And so General Sanchez, when General Sanchez's
14 order was handed down, it was handed down through his
15 military chain of command and applied to his military
16 soldiers. He clarified that on the record when he was
17 asked. That did it apply to KBR and the military? And at
18 first he said, yes, but then he said I need to clarify
19 that. It applied to all the burn pits that the military
20 controlled, the assigned forces controlled. And at that
21 time, Your Honor, there were no KBR burn pits in Iraq that
22 General Sanchez was aware of. There were some KBR
23 contractors and so yes, they would have been using those
24 burn pits, Your Honor. But you have to look at -- you
25 have to look, Your Honor, at what the only government

1 entity that directs a contractor told them. Found in a
2 task order and the statement of work, Your Honor.

3 And so the two entities once again, Your Honor,
4 they were asked, Did you get into that level of waste
5 management? Is that the method of performance? Is it a
6 what-not-how contract or did you actually tell KBR, go use
7 burn pits?

8 I don't recall. I don't recall ever getting any
9 detailed discussions about waste management other than
10 discussing whether or not an incinerator would be
11 authorized and this -- and the number of people that would
12 be authorized. Beyond that, I don't recall a specific
13 discussion at all about the method of waste management.
14 So I shouldn't read this sentence to say" -- this is from
15 his declaration -- "that DCMA and AMC, Your Honor,
16 specified that KBR was authorized to use a burn pit. You
17 should not interpret it that way, no.

18 And then he goes on to clarify that his
19 statement that burn pits was the default method comes from
20 his operational side, Your Honor, when he was a special
21 forces officer, very much forward deployed, infantry and
22 special forces.

23 And I asked him once again, there are two
24 standards here because we've covered -- there are times
25 the military does use burn pits?

1 Correct. Most of the time. Yes.

2 And in this sentence, it's following on and
3 talking about KBR. Are you saying that it's your
4 experience that the military asked KBR to use burn pits as
5 a default method of waste disposal? Are you? That's what
6 KBR is claiming.

7 I am not because we didn't -- I don't ever
8 recall having that level of detailed discussion about
9 waste management, not at my level anyway.

10 I went on to ask him, Your Honor, contractors
11 are expected -- and Damon Walsh is so critical to their
12 case that I need to cover this, Your Honor.

13 Are LOGCAPS are expected to be force
14 multipliers?

15 Correct.

16 And they are supposed to have the technical
17 training and capabilities to perform in a manner that the
18 military directs in the terms and conditions of the
19 contract?

20 They are expected to acquire those capabilities
21 and technical expertise. Yes.

22 And I asked him, In conformance with the terms
23 and conditions?

24 Correct.

25 The terms and conditions of the contract, Your

1 Honor, are the military issue, the sensitive military
2 issue that was made in this case.

3 Lieutenant Colonel Walsh, does a contractor have
4 discretion in how they carry out their job performance
5 what-not-how so long as the terms and conditions are met?

6 He says they have minimum discretion to do so.

7 And I said, why do you say minimum discretion,
8 if the terms and conditions are met, how they go about
9 achieving those terms and conditions, what role does the
10 military have in that?

11 The military defines the applicable
12 specifications and regulations.

13 So do they have some discretion in performing as
14 long as it meet those?

15 Yes. Yes, they do. This is a what-not-how
16 contract. The expectations of the contractor are defined
17 by the contractual terms and conditions.

18 And he goes on to say, describes -- and Your
19 Honor has got this testimony. But, you know, with respect
20 to food, we do get into a lot of detail there.

21 And I said, within the level of waste disposal,
22 did you see that level of specificity?

23 No. Other than again hazardous waste.
24 Hazardous waste doesn't suppose to go in burn pits.

25 That's not what General Sanchez told you. But

1 general -- I'm sorry. Lieutenant Colonel Walsh, the DCMA
2 commander, is saying we knew that HAZMATs were not
3 supposed to go anywhere near a burn pit, Your Honor.

4 THE COURT: Let me ask you a question. The
5 military in various reports to Congress has over and over
6 again said we made the decision to use burn pits because
7 in contingency operations, that is necessary and they
8 balanced all these factors and so forth. I didn't see
9 anywhere in those reports where they said KBR made that
10 decision or KBR shouldn't have done it. How am I supposed
11 to interpret that?

12 MR. LEDLIE: Your Honor, the reports that you're
13 referring to reference largely the CENTCOM regulations
14 from 2009, Your Honor. And absolutely, it's true that at
15 a theater level, CENTCOM, Central Command, made a military
16 decision that under certain -- that spelled out the
17 requirements for using burn pits and contingency
18 operations.

19 But we have to go back to 2003, 2004, Your
20 Honor.

21 And to round out this area, to the best of your
22 knowledge, the terms and conditions of the base life waste
23 management do not state that KBR had to use burn pits, do
24 they?

25 No.

1 were they given permission to burn anything they
2 wanted?

3 No.

4 There are two prongs to our case, Your Honor,
5 and a lot of this case is about whether or not KBR can use
6 a burn pit at all and we stand by that and we'll show why
7 that is still a huge part of our case.

8 But even in the limited instances where they did
9 have contractual permission to do so, there were still
10 standards that were not adhered to. That's another part
11 of plaintiffs' case that Your Honor is going to have to
12 grapple with.

13 So I'll ask, are there any regulations that the
14 army has on how the use of open air burning is to be
15 accomplished? He didn't know. But there was a contention
16 made in counsel's statements that because these contracts
17 clearly reference things like EPA standards, OEBDG, other
18 things that are terms and conditions of the contract that
19 both parties agreed to.

20 I asked him if a contract incorporates EPA
21 standards or other environmental compliance standards in a
22 task order, do those become terms of the conditions of the
23 contract that must be followed? His answer, Your Honor,
24 is absolutely.

25 Under LOGCAP III, is KBR expected to monitor

1 their performance to ensure compliance with any regulatory
2 standards?

3 Absolutely. The DCMA commander, the contract
4 command expected KBR to live up to its obligations that it
5 agreed to through the contracting process. And to the
6 extent that they included standards from the U.S. as terms
7 of the contract with the task orders in Iraq, they do
8 apply and they must be enforced.

9 There was further discussion and once again
10 citing to Mr. Walsh for this idea that through the ROM
11 process, Your Honor, the rough order of magnitude process,
12 that all this would have been talked about. That while
13 the contracts don't say anything about burn pits, that in
14 fact they discourage them heavily and prohibit them
15 without an ACO approval, that everybody was talking about
16 this in the planning process, in the ROM process. But
17 that's not what the commander at DCMA at the time that
18 this Sanchez order was handed down to the military command
19 said was going on on the contracting side because he was
20 part of that process.

21 With respect to waste disposal, were you
22 involved in the ROMs dealing with disposal at various
23 sites? He was.

24 What level of detail did you see? You didn't
25 see written authorizations for burn pits?

1 Correct.

2 Did you see burn pits mentioned at all in the
3 ROMs? No. It wasn't in there. No.

4 What did you see?

5 Head counts, pay levels. HAZMAT would have been
6 a different function as I recall under the task order.
7 Beyond that, the ROMs didn't get into operational
8 employment.

9 And do you have any personal knowledge as to
10 what those would have consisted of?

11 I have personal knowledge of almost all of those
12 conversations. During my time, I don't recall any time
13 that we talked about specifics surrounding waste
14 management as part of the ROM review process.

15 To say that this was included and discussed and
16 while the contracts say the exact opposite, that somehow
17 they shouldn't be followed is inconsistent with the
18 commander of DCMA at the time that General Sanchez's
19 directives were being handed down.

20 The DCMA has an independent duty to determine
21 how to best meet the military need. The need was waste
22 management, Your Honor, and the contracts speak to waste
23 management.

24 You heard from Mr. Singleton that said we would
25 get a contract for waste management, we did burn pits.

1 But the gentleman who was involved in the discussions
2 about that said that burn pits did not come up, they did
3 not come up.

4 The reason that this is significant, Your Honor,
5 is that the political question doctrine and separation of
6 powers do not allow the plaintiffs to judicially second
7 guess military decisions. The political question doctrine
8 and separation of powers do not allow KBR to judicially
9 second guess military decisions. The political question
10 doctrine and separation of powers do not allow this court
11 to judicially second guess military decisions. And no one
12 in the courtroom gets to substitute their judgment for the
13 government's judgment and decisions as to how the military
14 through the contracting command chooses to structure the
15 manner in which it handles contracting in general and
16 contracting on the battlefield in particular or as to what
17 the military puts in its contracts.

18 The court might think that given the conditions
19 on the ground, the way the government handled contracting
20 was ill-advised. The court might think that given the
21 conditions on the ground what the government put in the
22 contracts was ill-advised. The government may think that
23 what KBR agreed to in the contracts was ill-advised. But
24 no one in this courtroom, Your Honor, not even Your Honor
25 gets to second guess that.

1 The contracting process has meaning and it
2 cannot be second guessed because plaintiffs agree that
3 logistical support by contractors on the battlefield given
4 the military's current operational structure are
5 fundamental and vital to the health and safety of the
6 troops. But it's necessary that what the government
7 through the contract dictates is what KBR as the
8 contractor provides and that is because contractors are
9 not part of the military. They're not subject to the
10 same -- they're private companies, Your Honor, doing work
11 for pay and in dangerous conditions certainly. But the
12 relationship is not one between a direct report and the
13 military. It's between a civilian independent contractor
14 and the military and that relationship is exclusively
15 defined through the contracts.

16 Gina, could we go to Slide 1?

17 The contracting process, Your Honor, there's
18 a -- it is important to understand that the terms and
19 conditions of the contract establish the relationship
20 between the military and the government. The contract is
21 the only legal basis for the relationship between D.O.D.
22 and the contractor.

23 And, Your Honor, if we don't honor the terms and
24 conditions of the contract, then we have stripped away the
25 only legal basis under which the government can make sure

1 that the troops are getting the services which they've
2 been asked to provide and which the military is relying
3 upon contractors like KBR to provide.

4 The LOGCAP program is a wartime contingency
5 environment contract. Everybody knew that going into the
6 formation of the LOGCAP III contract and everybody knew
7 that each and every time a task order was being issued.
8 These were the standards that were applied to the
9 contractor on the battlefield. And when you have
10 contracted support, it differs significantly from when you
11 have military troops providing the support because you're
12 not under the military chain of command. It is
13 contractual control, not a military control. It's bound
14 by authorities in contract law and contract policies and
15 processes and procedures that support contract law.

16 And so, Your Honor, you've asked some questions
17 to my KBR colleagues that, well, whether it's operational
18 military or this combat command, I mean the military is
19 making this decision. Right? They are giving KBR
20 instructions and so it's a military decision. Well, the
21 military decision was set forth in the terms and
22 conditions of the contract. But because the contracting
23 command knows how to respect the status of KBR as an
24 independent contractor, it does not constitute a direct
25 form of control that's necessary for a political question.

1 Instead, you would be creating a per se rule, Your Honor,
2 that any time you have a contract in war and the
3 government is doing anything to ask for a certain type of
4 service to be provided, that that's automatically immune
5 from suit.

6 And Your Honor, case after case says that's not
7 the type of discriminating analysis you need to engage in.
8 If the military is merely establishing terms and
9 conditions of a contract and then providing routine
10 contract management, that's not direct control. That's
11 not integration into a command authority. That's
12 integration into a contracting situation. Similar to what
13 you have, yes, it's on the battlefield, but it follows the
14 same principles that you have here in the United States
15 even in the civilian context.

16 And there's a requirement that we comply with
17 all these FARs and DFARS and AFARS, Your Honor. And that
18 means that the combatant commanders, the General Sanchezes
19 and General Vineses of the world do not actually -- and
20 they were clear about this when they took the stand. They
21 don't set the terms and conditions of the contract. They
22 ask for a need to be met and the contract officers are the
23 ones that determine the best way for that to be
24 accomplished using an understanding of what the civilian
25 contractors' capabilities are as opposed to the military

1 units.

2 Next slide, Gina.

3 We've gone through this with Your Honor. But
4 what I want to hit in particular, Your Honor, we have an
5 operational arm of the military. That's the war fighters.
6 What General Vines says, what General Sanchez says to the
7 people under their command and control, their military
8 units absolutely needs to be followed without question.
9 That's the way the military works.

10 As to a civilian contractor like KBR, their
11 management and instructions comes through the contracting
12 arm using contract management principles and it does not
13 constitute direct command or control.

14 THE COURT: Well, is it your position that KBR
15 once they got these LOGCAP III contracts to provide waste
16 management and water services should have pushed back and
17 said we're not going to operate a burn pit, it's not
18 environmentally friendly and we're not going to do it?

19 MR. LEDLIE: Your Honor, when KBR and the
20 military sat down to negotiate and that would have been at
21 the Rock Island level because that's the entity in Rock
22 Island and KBR's upper management, we're the one -- the
23 procuring authorities under the LOGCAP. So they did sit
24 down and negotiate out the terms of the original LOGCAP
25 contract. But more importantly, Your Honor, that was done

1 before the war in Iraq.

2 But as to each and every task order, Your Honor,
3 KBR could sit down and say, look, we can't agree to that.
4 And there was a negotiation process before task orders
5 were entered and there's also the ability that's clear in
6 all the contracts. There's an escape valve. If you get
7 there and you discover the conditions are not such that I
8 can meet this, then you go to the contracting officer and
9 you get direction. You say, look, I said that I'd comply
10 with all EPA regulations, I can't do it here. What am I
11 supposed to do?

12 I'm not saying that they wouldn't have provided
13 the service. They would have gone and gotten the proper
14 instruction, there were proper authorizations and they
15 certainly could have moved forward.

16 There were times that KBR did refuse to take on
17 work for the very reason that Your Honor said. That they
18 looked at it and they said, look, we can't meet this
19 contractual requirement under the conditions that are
20 here. They did that with remediating burn pits, Your
21 Honor, and said, look, that's too much liability, we can't
22 meet those standards, and the government changed the
23 standards for them and said, okay, we understand that,
24 there's a way to fix that.

25 It's not a one-size-fits-all contract. This

1 contract went through thousands of changes. Changed over
2 the years in many ways. But what it never allowed was the
3 unlimited indiscriminate use of burn pits by a civilian
4 contractor, KBR. It was never that broad. It was never
5 allowed.

6 To make it clear, Your Honor, what we're dealing
7 with here and why the sensitive military decision that
8 needs to be respected is the fact that contractors are
9 managed through contracting authority, not command
10 authority. It's not just good policy. It's truly a
11 separation of powers concern. The contracting authority
12 is limited only to the contracting officer because it's
13 important for the government to comply with the U.S.
14 Constitution, statutory authority and finally regulatory
15 authority as to how goods and services for the military
16 are procured and managed.

17 DCMA had the exclusive -- and Rock Island had
18 the exclusive responsibility through their contract
19 officers to set the standards of performance for KBR. It
20 could be modified through the contracting command, but
21 only through the contracting command.

22 Command authority Your Honor asked, that was one
23 of the questions you wanted addressed. Command authority
24 prescribed in 164 includes -- and there's a number of
25 things here. But the big test, Your Honor -- and we'll

1 get to this in the cases later. But the real question is
2 is KBR being treated as an independent contractor with
3 their own management and day-to-day services trying to
4 figure out how they're going to meet their contractual
5 terms through their own chain of command or under the set,
6 the unique set of cases that we'll see were their forces
7 merely labor that was loaned to the military for a
8 military mission or were they combined into a military
9 mission for a limited purpose, such as convoy operations
10 which are the exception not the rule, Your Honor.

11 And it is important to note that GCCs -- that's
12 geographic combatant commanders, Your Honor -- General
13 vines, General Sanchez, do not have their own contracting
14 authority. They're not authorized to order contractors in
15 the terms and conditions of a contract. And that's for
16 the good of the mission, Your Honor.

17 I need to note that General vollmecke and I
18 think I alerted Your Honor that he had a health condition,
19 I would now that defendants have offered into evidence
20 their portions of his deposition counter with our
21 designations for General vollmecke in response because
22 that was not something that we anticipated, but we simply
23 for the record to be clear would like for our designations
24 to be considered in context as well, Your Honor.

25 THE COURT: All right. When can you give those

1 to me? Can you do it today or --

2 MR. LEDLIE: Yes. We can do that today, Your
3 Honor.

4 THE COURT: Okay. That's fine. We can make
5 copies for you if you wish to.

6 MR. RUSSELL: Your Honor, sorry to interrupt.
7 We've provided to the court a copy that has both our
8 designations as well as the --

9 THE COURT: Well, it's already there? Oh, okay.

10 MR. RUSSELL: The highlights are in there. Yes.

11 THE COURT: Well, just make sure you agree with
12 that and then I can see what you're talking about.

13 MR. LEDLIE: Thank you, Your Honor, and thank
14 you, Mr. Russell.

15 But General Vollmecke explains that it is
16 necessary to separate command authority from contracting
17 authority for the overall good of the military mission
18 because there's a need to keep them separate. The war
19 fighter needs to have an independent and informed person
20 to deal with a civilian contractor. Military officials
21 are not all versed in contracting law and contracting
22 principles. The integrity of the process and of the
23 fiscal process of the United States are why these commands
24 are separated. They work together, but the contracting
25 command maintains the independence, Your Honor, to set the

1 standards.

2 Even in a war zone, General Vollmecke went on to
3 explain that command authority, even if someone is a head
4 of a particular unit, but has command authority, they have
5 no warrant and no ability to unilaterally change the
6 contract terms. They do not and I remind them it's
7 actually spelled out in the service supplements to the FAR
8 and it makes it crystal clear, especially in the D.O.D.
9 FAR supplement, that responsibility.

10 And does that fact, the fact that it's a
11 contingency operation doesn't evaporate that distinction?

12 No. It's exempt from that distinction.

13 So, Your Honor, the combat commanders do seek
14 support in operations from contractors. They identify a
15 need like waste management. But the contracting command
16 delineates the standards that apply to a contractor like
17 KBR. In consultation with that contractor, they're
18 reduced to contract documents which form the basis of the
19 relationship. That forms the military decision that Your
20 Honor must respect.

21 The contracting officer through the contracting
22 command is the only government official with the authority
23 to modify a contract or determine the terms and conditions
24 of a contract, Your Honor.

25 It's well established that the contractual rules

1 applied to the LOGCAP contracts in war zones. This is
2 Plaintiffs' Exhibit 8, Your Honor, LOGCAP 101 which
3 explains that the administrative contracting officer is
4 the government official in theater with the legal
5 authority to direct the LOGCAP contractor to perform a
6 mission. Only the ACO or the PCO can direct the
7 contractor. It may even be considered an anti-deficiency
8 act violation if another party directs the LOGCAP
9 contractor. This is a very bad idea. That is why both
10 General Vines and General Sanchez said that while they did
11 have an understanding that burn pits would be used for
12 their command, that they did not interfere with the
13 contracting process. They did not set the terms and
14 conditions. They didn't know what those contracts
15 required. But they did expect the contractor to meet
16 those obligations and if changes were needed to seek that
17 out through the contracting process, Your Honor. That's
18 consistent not just with the military's understanding.
19 That was consistent with KBR's own understanding as to how
20 this entire process needed to work in theater.

21 Mary Wade who was referenced earlier, KBR's
22 contracts manager and senior contracts manager for LOGCAP
23 III said that regardless of what the operational military
24 or the mayor cell on a base may want on the military side,
25 they had to get it through the contract process at Rock

1 Island and the contract process would rely upon subject
2 matter experts who look at the capabilities of a
3 contractor, look at the realities of the military and say
4 this is what best conforms, this is the standards. And
5 once those standards were set, that's the military
6 decision, Your Honor.

7 Steve Zamparelli, another DCMA commander, made
8 it clear that the standards you're looking at, Your Honor,
9 whether or not KBR is authorized to do an unlimited
10 burning of waste at burn pits, you got to look to the
11 contract documents, the procuring documents and the
12 administration of that contract in the field. And when
13 you do that, Your Honor, you will see that there was never
14 blanket authorization for KBR to use burn pits anywhere
15 and everywhere. It had to be done at the direction of the
16 ACO. Over time, the contracts changed and it did become
17 an allowed form of waste management, but only when proper
18 direction was received from the contract officer and only
19 when the performance standards that applied in that
20 situation were adhered to. So contract violations, Your
21 Honor, are a very much a part of our case. They do go to
22 the control or lack of control over the contractor.

23 The central tenet of KBR's presentation here
24 today, Your Honor, has been that in all cases, in
25 Operation Enduring Freedom and in Operation Iraqi Freedom,

1 Iraq and Afghanistan, including burn pits operated by KBR,
2 the military decided which method of waste disposal was
3 viable and consistent with the military's objectives.

4 But when you look at the individuals that they
5 cite in support of that premise, they are the first ones
6 to admit that they don't know that what the contracts
7 required, what the contracting command placed as the
8 obligations that applied to KBR. They're speaking from
9 their military knowledge in other context, Your Honor, or
10 they simply don't have knowledge, a lot of them didn't
11 have knowledge as to what the contract required at all.

12 General Sanchez while his testimony, as I stated
13 to Your Honor earlier, is clear that he did issue an order
14 that was handed down through his command at a time that in
15 his own words, he doesn't believe KBR was even doing any
16 waste disposal, for the military to use burn pits, he
17 agreed that when it came to the contracting process, the
18 terms and conditions of the contract, that his command
19 authority is distinct from contracting authority, that
20 only the LOGCAP contract officers had contracting
21 authority, that military officers cannot direct or
22 supervise KBR, Your Honor. That he nor his command ever
23 dictated the terms of any contract. That's not what
24 combatant commanders do. They identify a need that needs
25 to be met like waste disposal, like water services and

1 then they turn that over to the contracting arm to
2 determine how to best get those services that they need in
3 theater, Your Honor.

4 General Sanchez doesn't know if KBR was in
5 compliance with the LOGCAP contract during his tenure. He
6 admits that he absolutely expected them to comply with
7 whatever those standards were and that he never authorized
8 them to deviate from any of their contractual
9 obligations --

10 THE COURT: He also said he didn't know what was
11 in the LOGCAP contract, didn't he?

12 MR. LEDLIE: He did say that he didn't know what
13 was in the LOGCAP contract --

14 THE COURT: That's not his job to draw up those
15 contracts. Right?

16 MR. LEDLIE: Absolutely. It's not his job to
17 draw up those contracts, Your Honor. But he never
18 authorized any deviations from it. In fact it would be
19 inappropriate in his opinion, Your Honor, for him or his
20 subordinates and he said I never did that. Didn't happen.

21 His time period in Iraq, Your Honor, was limited
22 to 14 months. The beginning of 2003 when military forces
23 were primarily handling all logistic functions, he said it
24 took a very long time before that changed and he admits
25 that after he left in July of 2004, he doesn't have any

1 personal knowledge as to whether the military or DCMA
2 talked to KBR with respect to waste disposal. His
3 knowledge is limited and as demonstrated through the
4 testimony of Lieutenant Colonel Walsh, it's not accurate
5 to claim that DCMA took a blanket burn pit order and
6 contractually turned that into an instruction to KBR. It
7 didn't happen. He was the DCMA commander. He was
8 involved in those discussions and he said that didn't
9 happen. It was what not how. If you look at the
10 contract, it says waste management in accordance with all
11 U.S. laws and conditions. That was the standard, Your
12 Honor. And we can't second guess that.

13 We know that that was the standard, Your Honor,
14 because if KBR had blanket permission that had been
15 communicated from the contracting arm to KBR, why in the
16 world in 2004 were 41 incinerators being delivered to
17 bases in Iraq?

18 Your Honor asked about the incinerators. The
19 incinerator claim is a little long in explanation. But
20 the important point here, Your Honor, is any suggestion
21 that the military was happy with burn pits that they had
22 made a command decision that everybody, contractors,
23 military, everybody use burn pits, that's the only thing
24 you should use, never use anything else. That is not
25 factually accurate, Your Honor, because in reality by

1 2004, 41 incinerators -- this comes from the testimony of
2 Gerry Vincent which is in our brief, Your Honor. Gerald
3 Vincent. Forty-one incinerators had been delivered and
4 were in the process of being installed.

5 KBR was not the fastest in dealing with that
6 situation, which relates to part of our claim, Your Honor.
7 However, there was a stop work order sent down and
8 that's -- nothing they could do about that. We don't
9 contest that.

10 But following that, that stop order was lifted
11 in 2006. Many years of the involvement of Iraq continued
12 after 2006. The military finally could use those
13 incinerators again. But KBR had not kept them up and the
14 military had a very difficult time tracking down where
15 they were, where the parts were and all the time that they
16 were trying to sort this out, burn pits continued to need
17 to be used because the incinerators could not be brought
18 online.

19 So, yes, that is part of our claim. It remains
20 part of our claim. It also completely obliterates the
21 suggestion that burn pits were the only thing that the
22 military ever wanted in theater, the only thing that was
23 reasonable, the only thing that was achievable. Simply
24 not true, Your Honor.

25 General Vines was another witness that Your

1 Honor heard from that supports our claim. He agreed that
2 the terms and conditions of the contract is the way the
3 military controls the contractor. It's not command
4 authority. It's contractual authority. He agrees that
5 the contracting officer is the only government official
6 with the authority to modify the contract and that is
7 adhered to even in the theater of war, Your Honor, which
8 is transcript at page 42, 10 through 17.

9 He agreed that the contractor sets forth the
10 performance standards. The contractor sets forth the
11 performance standards and defines what the contractor
12 needs to do in the field. They're expected to comply with
13 their contractual requirements. In order for KBR to be a
14 force multiplier, we don't expect General Vines, we don't
15 expect General Sanchez to know every detail of that
16 contract. They've got folks that they rely upon for that.
17 That's the contracting command who sets the standard and
18 the contractor is the first line quality assurance
19 representative, the subject matter expert that's supposed
20 to figure out how to best adhere to that standard in
21 theater.

22 If they have difficulties, Your Honor, there is
23 a process. It was used routinely by KBR and by the
24 military to tweak a contract as necessary. But he admits
25 that he never superseded the contracting channels and

1 ordered KBR to do anything and he expected KBR themselves
2 to manage their personnel as to their performance on a
3 day-to-day basis. They were force multipliers because the
4 military was no longer performing that function. They
5 were relying upon KBR to do so and to do so in conformance
6 with the contract. That's what the generals both told
7 you.

8 And he agreed that any suggestion that there was
9 a blanket order for anything and everything to be placed
10 in a burn pit and indiscriminately burned during his
11 tenure was not the case. He knew that hazardous materials
12 were not authorized to be placed in burn pits and that KBR
13 to the extent they were using a burn pit was expected to
14 segregate and sort out those materials and make sure it
15 didn't make it in there because that is a health risk to
16 soldiers, Your Honor, and that's what he knew about the
17 contract.

18 And by no means was General Vines the only
19 witness in this case to confirm that KBR or anyone for
20 that matter operating a burn pit was not authorized to
21 burn toxic substances in burn pits. Gerald Vincent never
22 gave permission to burn prohibited items in burn pits as
23 he explained in his deposition. Colonel Frank Steinbugl
24 from DCMA was unaware of any authorization to burn
25 batteries or other toxic substances. General Vines, of

1 course, we've just spoken about. Colonel Walsh, KBR was
2 not given permission. Even KBR's witnesses. David Palmer
3 who you heard briefly from from plaintiffs agreed that
4 there were hazardous waste collection points and that that
5 mattered and that they should -- those items should never
6 be placed in a burn pit. Those were the contractual
7 standards, Your Honor. And just the mere fact that a burn
8 pit in certain instances was authorized for KBR didn't
9 obligate them of their requirement to make sure that
10 whatever ended up in that burn pit adhered to the terms
11 and conditions of the contract.

12 General Radin was the commanding general of Army
13 Sustainment Command. That's on the army material side.
14 He's the overall two-star general that was in charge of
15 the LOGCAP contract, Your Honor, and he had no personal
16 knowledge of KBR being given permission to burn anything
17 at a burn pit.

18 Charlie Williams, similar testimony, Your Honor.
19 And ACO Wes Bennett never gave KBR any permission to burn
20 lithium batteries, petroleum oil, lubricating products.
21 These things were not supposed to end up in burn pits,
22 Your Honor. They weren't supposed to be burned, no matter
23 what else. Those were hard and fast rules the military
24 expected to be adhered to. And plaintiffs' contention and
25 there's evidence in this case that they were not.

1 One example, and Your Honor heard from
2 Mr. Robbins about his experience, his lack of supervision,
3 his total lack of military oversight at all except on very
4 rare occasions for five minutes at a time. This is not a
5 situation, Your Honor, where the military had its thumb on
6 KBR and how they were carrying out their day-to-day job
7 functions. This was a situation where the military was
8 relying upon KBR to be that force multiplier and to adhere
9 to the contract they agreed to honor.

10 That's made clear by the testimony of Wes
11 Bennett, the administrative contract officer, who said
12 that if KBR had a responsibility and there was an issue
13 with waste management, it's their responsibility to fix
14 that issue whether or not somebody noticed it, whether or
15 not he as an ACO noticed it. The first line
16 responsibility was on the contractor to adhere to the
17 contract, Your Honor.

18 If the statement of work required KBR to follow
19 particular standards, then yes, they would be required to
20 follow them whether or not somebody noticed that they
21 weren't following them. It's from his deposition, Exhibit
22 43 to our brief, Your Honor.

23 So, Your Honor, how does this discussion of burn
24 pits and the contracts and the standards that apply to
25 KBR, how does it actually relate to the two questions that

1 Your Honor asked us to be prepared to decide here today?

2 The first question, Your Honor, is whether a
3 contractor, in this case, KBR, was under the plenary or
4 direct control of the military during the waste and water
5 functions. And the answer to that, Your Honor, will be
6 made clear that they were not under that test, direct and
7 plenary control. Those are very specific terms with a
8 very specific meaning. And you need to do a
9 discriminating inquiry into the precise facts and postures
10 of the particular case under Baker to decide whether the
11 duty asserted can be judicially identified and the breach
12 determined.

13 So let's look at what plenary and direct control
14 look like, Your Honor. The Carmichael case was discussed
15 at length earlier. In the Carmichael case, we had a true
16 military mission, a military convoy in which you had the
17 front vehicle was a military gun truck that was commanded
18 by the convoy commander who had the ultimate say on the
19 entire performance of that mission. Interspersed between
20 the military gun trucks, you did have KBR in this case
21 fuel trucks and in each cab of each truck the military
22 assigned a soldier, a shooter to actually sit side by side
23 with the KBR driver and be part of a joint mission to get
24 from point A to point B at the direction of the convoy
25 commander.

1 But the convoy commander, not the -- this is the
2 exception under the LOGCAP contract, the force protection
3 exception which was included as an actual term of the
4 contract said if you're in this situation, if you're in a
5 convoy, you do submit to the direction of the military in
6 everything that you do. You still have a KBR convoy
7 commander, but all he's doing is serving as a conduit.

8 But look at what we see here, Your Honor. The
9 convoy commander at the front set the speed, 50 to
10 60 miles an hour. He said the vehicles would be spaced a
11 hundred yards apart. He said we're going to take this
12 route even though I know it's dangerous, it's the best
13 route we can go on. And we're going to go through some
14 S-shaped curves, Your Honor, at high speeds, but in my
15 military decision making that's the best thing for us to
16 do to reduce the risk to you for me to help protect you.
17 That's what direct and plenary control is, Your Honor.
18 The military has truly taken KBR in that instance under
19 its de facto command because the KBR truck spaced between
20 military trucks is going to do exactly what is directed
21 and for its own safety. It's going to comply, Your Honor.
22 But we have a high degree of complete and utter control of
23 every facet --

24 THE COURT: well, isn't a military base in a
25 forward -- a forward operating base in a war zone

1 something that's heavily controlled by the military in
2 every respect?

3 MR. LEDLIE: Yes, Your Honor. In many respects.
4 However, the relationship between the military and the
5 contractor on the base is much different than what you see
6 in the convoy cases because -- and let's go to the next
7 slide. Then we can help parse this out a little bit, Your
8 Honor.

9 The contracts are very much unlike the convoy
10 situation because the military is not giving direct
11 instructions to the individual contractor employees.
12 Doesn't do that. They are not dictating every facet of
13 every day, every operation. They are not that involved,
14 Your Honor. They perform contract management. They check
15 on the performance of the contract. But they don't get
16 involved in how KBR orders their affairs. They don't get
17 involved in how KBR determines exactly the best way to
18 meet the contractual requirements. That's the difference.

19 Plenary control is direct control. It means
20 that when you ask KBR who they answer to in the convoy
21 situation and the declarations in that case that you see
22 from the KBR personnel is that they knew full well that
23 they answer in that situation to the C.C., the convoy
24 commander. The military convoy commander is who set
25 everything that they were doing. They had no choice and

1 wouldn't dare of dreaming of doing anything different.

2 You talk to the people that we heard at the burn
3 pits and they say no, I was answering to KBR's management.
4 They were the ones that were giving me any instruction.
5 The military was not telling me what to do on a day-to-day
6 basis. It's not plenary control. It's not direct
7 control. It's contract management. It's completely
8 different, Your Honor. You need to do the discriminating
9 analysis.

10 How do we know this? Well, there are other
11 LOGCAP III cases out there other than Carmichael.
12 Carmichael was in a force protection convoy situation.
13 There was direct and plenary control there. But in the
14 Taylor case, Your Honor, the court in Taylor looked at the
15 first prong of Taylor -- I'm sorry -- the first prong of
16 political question and said, well, let's look at the
17 contract. Was KBR under the direct and plenary control of
18 the military? No. By looking at just the contract terms,
19 we can see that the contractor shall be responsible for
20 the safety of their employees and base camp residents and
21 have exclusive supervisory authority and responsibility
22 over their employees. That is giving the contractor
23 discretion in determining how they're going to meet that
24 standard. And in that situation the court said that's not
25 direct and plenary control. That's not a political

1 question under prong 1.

2 They moved on to prong 2, which Your Honor did
3 not tee up for today's hearing. We will respond to your
4 questions on that as best we can, but it hasn't been --

5 THE COURT: Well, I wasn't trying to narrow your
6 argument at all. I just said some things I wanted to make
7 sure you all covered. So you say anything you want.

8 MR. LEDLIE: Oh, yes, Your Honor. No. I wanted
9 to clarify that the two issues that you put up for today's
10 hearing, Your Honor, were the extent of control and the
11 integration question, Your Honor.

12 You are now asking some questions about the
13 second Taylor factor which plaintiff did not understand
14 that the court would be entertaining. KBR raised it in
15 their brief and so we did respond and we will get to
16 Taylor 2, Your Honor. But the short answer there is it's
17 not ripe for the court's consideration at this time and it
18 wasn't something that was discussed as being at issue for
19 today's hearing.

20 But Harris is another LOGCAP III case. I should
21 point out, Your Honor, the very language that Taylor found
22 determinative as to whether or not Taylor Factor 1 was at
23 issue, the very same language is contained in the LOGCAP
24 task orders at issue in this case.

25 Harris was another LOGCAP III case. If contract

1 administration, Your Honor, was sufficient to trigger
2 direct and plenary control, we wouldn't have Taylor
3 advancing on Factor 1. We wouldn't have Harris advancing
4 on Factor 1. You wouldn't have any of these cases. But
5 it's not a per se rule, Your Honor. You've got to look at
6 the precise facts.

7 In Taylor, the precise facts were KBR sent out
8 some electricians. They had their own electricians. They
9 got there in their own truck. They did their work. There
10 was a question about them doing that work, whether they
11 complied with the contract terms and conditions. The
12 court said on that they were self-managed. They had their
13 own reasons for hiring the electricians they did and for
14 doing the work they did. If they complied or not is not a
15 political question.

16 THE COURT: Well, isn't there a significant
17 difference between analyzing something as simple as that
18 one discreet incident under the circumstances you've just
19 described and making the same assessment over a decade
20 long period of time in two vast countries and theaters of
21 war? Isn't it a bit different?

22 MR. LEDLIE: Very different, Your Honor. But
23 simply because the task is difficult, it doesn't give this
24 court the ability to abrogate its duty to decide
25 justiciable questions.

1 Harris LOGCAP III is another LOGCAP III case,
2 Your Honor. It was brought under Task Order 139, one of
3 the task orders at issue in this case, Your Honor. It was
4 a maintenance function under that contract, not waste
5 management. But there, once again, the entire structure
6 of the LOGCAP program, when it comes to the on-FOB
7 provision of support services gives KBR significant
8 discretion in how to complete their work. Where
9 plaintiffs' claims are based solely on whether KBR
10 satisfied its contract duties, that Taylor Prong 1, direct
11 and plenary control factor is not satisfied. That is a
12 justiciable case that moves on to whether or not there is
13 some other reason why the case cannot go forward. But it
14 is a justiciable case in controversy, Your Honor. The
15 same thing is true here. The same terms are true here.

16 Here's Task Order 89 has work site safety.
17 Making sure that -- the same language from Taylor, Your
18 Honor, as well as 1.1.2, there was a question about OSHA.
19 OSHA was a required term in the contract, Your Honor.
20 Right there in Task Order 139. And this makes clear that
21 KBR is being the one that's being tasked with the job of
22 making sure that their work, the work that they are
23 performing under the contract is safe for their employees,
24 but also for the base camp residents during all contractor
25 operations in accordance with the statement of work and

1 the army and OSHA safety regulations as applied to the
2 Iraq theater of operations. So extraterritorial OSHA,
3 yes, specifically mentions applying it in the Iraq theater
4 of operations, Your Honor.

5 This is probably the most important provision in
6 the LOGCAP III contract, Your Honor, with respect to both
7 direct control under the Taylor test as well as command
8 authority under the Saleh test and it's provision 1.1.1 of
9 Plaintiffs' Exhibit 2 and it states that the contractor
10 shall have the exclusive supervisory authority and
11 responsibility over its employees. The government shall
12 manage the contract, but will not exert control or
13 supervision over contractor employees. That was the
14 standard as written in the contract. It was also the
15 standard as administered in the field, Your Honor, and
16 because of that, this case does not present a situation
17 where the court doesn't have discernible standards or
18 whether despite the existence of discernible standards,
19 the military so thoroughly overtook KBR's movements and
20 operations at the job site that it creates a political
21 question or triggers the Saleh combatant activities
22 exception, Your Honor. And I'd like to explore that
23 further.

24 Task Order 139, Your Honor, gave KBR operational
25 control in the context of the statement of work, so in the

1 terms and conditions of the contract, the contractor is
2 fully responsible for performing the function, service or
3 capability specified by the government. The contractor
4 shall report its performance outcomes to the responsible
5 and accountable government official in charge. But the
6 contractor, not the military commander shall maintain
7 supervisory control over all contractor employees.

8 Every witness that took the stand -- they were
9 mainly KBR witnesses -- understood that KBR was not
10 integrated into -- we didn't have a situation where the
11 military was running a burn pit and they just assigned
12 some KBR guys to go work for a sergeant commanding that
13 operation in day to day. They weren't taking their
14 day-to-day instruction from the military. They were
15 taking their day-to-day instruction from their own
16 management and their own management was determining how
17 they would exercise operational control over that site to
18 adhere to the contract requirements, Your Honor.

19 THE COURT: Mr. Ledlie, are you at a point where
20 we could take a break?

21 MR. LEDLIE: I am, Your Honor.

22 THE COURT: Because I'm looking at your slides
23 and I'm saying, hmm, he's not going to be done in 15
24 minutes.

25 MR. LEDLIE: This would be a good transition

1 point, Your Honor. If I could just go over this one point
2 and then --

3 THE COURT: No. Finish your thought. I don't
4 want to interrupt your thought. But I thought we would
5 take a break for lunch. Then you could wrap it up then.

6 MR. LEDLIE: Sure. Well, let me just leave you
7 with this, Your Honor, for the lunch break. Direct and
8 plenary control we know from Carmichael is the military
9 taking complete ownership over that particular mission on
10 those -- if this case was about a convoy stopping on the
11 side of the road and creating a burn pit and everybody
12 camping around it for the night and moving on, we wouldn't
13 be here, Your Honor. Because in that situation, the
14 convoy commander has complete control of that mission.
15 The mission is not the war effort in Iraq, Your Honor.
16 The mission is that specific function being followed. In
17 that case, convoy. In this case, waste management and
18 water functions. And in that situation, the management
19 and control of contractors is significantly different than
20 the command and control of soldiers and the Department of
21 Army civilians. That's from the field manual, Contractors
22 on the Battlefield, Your Honor. I understand. And I,
23 too, would like a lunch break, Your Honor. So if this
24 would be a good transition point --

25 THE COURT: Well, ignore that clock. We'll take

1 a break until 2 p.m. and by the time you get back, that
2 clock will be fixed.

3 (Luncheon Recess.)

4 AFTERNOON SESSION

5 THE COURT: You may resume, Mr. Ledlie.

6 MR. LEDLIE: Thank you, Your Honor.

7 Your Honor, as I discussed earlier, neither the
8 plaintiffs, the defendants nor the court under the
9 political question doctrine and separation of powers
10 principles is allowed to second guess sensitive military
11 judgments that were expressed through the contracting
12 process set up by the United States military for use in
13 contracting on the battlefield. That's what this case
14 involves and the operative standards are set forth in the
15 actual contracts. And the contracts must be given the
16 weight that they deserve as the determinations by the
17 United States military as to what KBR was obligated to
18 perform in order to adhere to their contractual
19 obligations that they agreed to meet.

20 Mr. Baker in his opening and during our evidence
21 portion walked Your Honor through a number of these
22 contracts and I just want to highlight a few of the
23 significant facts.

24 Primarily, Your Honor, that when you look at
25 these contracts, particularly under the political question

1 doctrine looking at whether they directly controlled or
2 plenary control, what is made clear through the contracts
3 is that they afforded KBR as the subject matter expert the
4 discretion to determine how it would achieve the
5 standards. They set tasks and performance standards. But
6 they did not dictate every minutia as to how KBR was to
7 perform waste management or water services.

8 We're not going to go in detail, Your Honor, but
9 you'll notice, for instance, in Task Order 59 and the
10 timeframe in this would have been in October of 2004, Your
11 Honor, that the contractor shall provide, operate and
12 maintain a waste management system. It doesn't say burn
13 pit. It doesn't say exactly how they are to set that up.
14 It doesn't say they're going to interact with a army
15 environmental officer in coming up with their system. The
16 contractor is given that responsibility. The contractor
17 is expected to know how to do their job as a subject
18 matter expert. But in doing their job, they do have to
19 adhere to the performance standards of meeting army
20 regulatory guidance and supporting the population and
21 function of the base camp. The contract specifically
22 states that the contractor, KBR, is responsible for
23 collecting and storing HAZMAT, HAZ waste generated by
24 their internal operations and utilizing DRMS to transport
25 and dispose. HAZMAT was a separate category of waste that

1 needed to be dealt with in an appropriate fashion.

2 And even in 2004, the United States military was
3 making it clear in the contractual requirements that
4 HAZMAT needed to be placed in a HAZMAT disposal area.

5 THE COURT: Would that include water bottles?

6 MR. LEDLIE: Your Honor, in 2004, the definition
7 of HAZMAT or HAZ waste would be governed by army
8 regulatory standards. And as Your Honor has specifically
9 held off discovery on violations, the language in the
10 contract doesn't speak to that specifically, Your Honor.
11 But it does make clear that military units are responsible
12 for establishing their own hazardous waste areas, but the
13 contractor shall utilize the military's hazardous waste
14 storage area for disposal and collection of HAZMAT at
15 those locations where it has been established.

16 On the plastics issue though, Your Honor, I
17 would point out that once again KBR, if you look at their
18 evidence, is conflating military operations, military burn
19 pits with contractor-run burn pits. If KBR had specific
20 permission to dispose of plastic water bottles, you would
21 find that in the contracting process, in the contracting
22 documents, Your Honor. And you don't see that in 2004.

23 Instead at this time, this was before any stop
24 work order or anything of the sort, the contractor was
25 required to incinerate using a contractor-acquired

1 incinerator and as we discussed, Your Honor, these were in
2 fact ordered and shipped. That was the army's initial
3 plan. All solid waste to include medical waste, but
4 excluding recyclables.

5 The intention of the contract documents make
6 clear that recyclables were something which would include
7 plastic water bottles, Your Honor, that KBR was to deal
8 with, to segregate, to separate. And they go on to talk
9 about the ensure the products of combustion. It's talking
10 about the incinerator there, Your Honor. But that doesn't
11 remove the fact that these contracts did set forth army
12 regulatory guidance that applied to how waste was to be
13 handled including a requirement that certain products be
14 segregated out and disposed of in a different channel of
15 disposal. In fact, notwithstanding any other provisions
16 in this statement of work, the contractor shall comply
17 with all U.S. laws.

18 There is a clear contract term, Your Honor, that
19 allows for in case of any inconsistencies like we don't
20 have an incinerator right now, what should we do? The
21 contractor shall contact the administrative contract
22 officer, identify the inconsistency and seek guidance.
23 All performance shall meet army regulatory standards
24 unless otherwise stated.

25 In performing their work, KBR agreed to be

1 responsible for the safety of its employees and base camp
2 residents during all operations in accordance with army
3 and OSHA safety regulations and guidance.

4 Once again, 1.4, Your Honor. These were not
5 one-size-fits-all contracts. This was not a
6 one-size-fits-all contracting process. This was not the
7 army's first time going to battle with contractors as a
8 support element. That's been true throughout the history
9 of the United States Army. In fact going back to before
10 this even was a country when we were in the revolutionary
11 battles, contractors have always supported orders on the
12 battlefield. The army has a long history of knowing that
13 that can be done. And that in order for it to be done
14 effectively and to be done in a way that actually serves
15 the army's mission, they need to know that the contractor
16 is going to get them what they need and the way that they
17 determine that process is through the contracting process
18 and the contracting documents.

19 And once the army, the military has set forth
20 those standards in writing to the contractor in clear and
21 unambiguous terms, Your Honor, this court cannot second
22 guess the wisdom of the army's decision making in this
23 area. The army knew what it wanted. It said what it
24 wanted. It didn't get what it should have gotten.

25 The army said knowing that this was a task

1 order, you can see up here under LOGCAP statement of work,
2 Multi-National Force, Multi-National Corps Iraq Sites.
3 The army knew that it was in Iraq when it issued this task
4 order. And it said the contractor shall adhere to the
5 Overseas Environmental Baseline Guidance Document in the
6 performance of this statement of work unless otherwise
7 directed by the ACO as determined to be in the best
8 interest of the U.S. government. And when you look at
9 that OEGBD, Your Honor -- did I say it right?

10 THE COURT: We'll draft you into the military
11 sooner or later with all these alphabet soup terms.

12 MR. LEDLIE: Well, Your Honor, I should note
13 that I am a veteran. I'm a former armor officer and a
14 former JAG officer. So I've had a little bit easier time
15 with some of the terminology. But OEGBD, something about
16 that term in particular is a tongue twister for me. I
17 think it was for Ms. Burke as well.

18 If we can go to the next slide, Your Honor?

19 Once again, this is not a -- this was
20 specifically included in this Iraq statement of work. It
21 comes from the Department of Defense. March of 2000. And
22 certainly, these contracting officers at the Rock Island
23 division of the Army Sustainment Corps at that point would
24 have known what this document said. One of the terms is
25 that open burning will not be the regular method of solid

1 waste disposal. That's what the military said in their
2 considered judgment as applied to Task Order 139 -- Task
3 Order 59. This was a very early document, Your Honor.
4 2004. And that is what the military has said.

5 But in considering the facts of this case, in
6 giving the discriminating analysis which Baker requires,
7 we aren't dealing with, unfortunately for Your Honor, just
8 one timeframe and the standards did change over time.

9 In 2006, once again a LOGCAP statement of work
10 for Iraq, we see new language in the non-hazardous solid
11 waste management and disposal program. There is still a
12 requirement that the contractor come up with a waste
13 management system and program to include containers and
14 dumpsters, separation, collection and removal of gray
15 water to -- and black water to meet army regulatory
16 standards and the master statement of work or MSOW.

17 The contractor shall conduct non-hazardous
18 waste, solid waste management activities in accordance
19 with the order of precedence below. So this only applies
20 to nonhazardous solid waste. But with respect to those
21 items, the contract required that the contractor shall
22 conduct recycling in accordance with the LSO and at the
23 direction of the ACO incineration, if possible, landfills.
24 The contractor shall provide new and utilize
25 uncontaminated existing landfills in coordination with the

1 LSO and at the direction of the ACO and the Multi-National
2 Corps C-7 Environmental SOP. Even in 2006, Multi-National
3 Corps Iraq had environmental SOPs that related to how
4 non-hazardous waste would be handled in theater, in the
5 war theater and it was included as a term and condition of
6 the contract.

7 Surface burning at this time -- this is in 2006.
8 The first -- I can't say that this version, 14.2, is the
9 first one. But we do see at this time surface burning as
10 one of the programs which might be approved by the
11 contract officer, but --

12 THE COURT: Mr. Ledlie, the slide you've got on
13 the screen is 78 and my slides stop at 54. Do you have
14 some more?

15 MR. LEDLIE: Your Honor, I was not planning to
16 go back through the contract language with Your Honor
17 because I thought we had one -- I was planning on one hour
18 for this presentation. Given the breadth of my
19 colleagues' presentation and the importance of the
20 contract language, which once again, Your Honor, we think
21 is critical to this case, it does set the discernible
22 standards that must be applied in this case.

23 THE COURT: Well, that's fine. Just give me the
24 slides later. That's fine.

25 MR. LEDLIE: Oh, yeah.

1 THE COURT: If you don't have copies, we can
2 make copies. But that's fine.

3 MR. LEDLIE: Yes, Your Honor. We'll be happy to
4 do that.

5 THE COURT: Okay. Thank you.

6 MR. LEDLIE: The surface burning, Your Honor,
7 had to be done at the direction of the ACO and it speaks
8 to the contractor providing new or operate an
9 uncontaminated existing burn pit site while minimizing the
10 environmental effects on the base camp. They are the
11 subject matter experts. If they got permission from an
12 ACO to do surface burning, now the what-not-how is do so
13 in a way that minimizes the environmental effects on the
14 base camp.

15 The contractor shall ensure the products of
16 combustion are reduced to give ash and non-combustible
17 components. The contractor shall minimize any type of
18 smoke exposures to the camp population.

19 I know that Your Honor at this time has set
20 aside the violations issue for a later date. But it is
21 very much part of our claim, Your Honor, and since the
22 contract required clear language as to minimization and if
23 you look at the case law, that is the type of standard
24 that is exactly what you would expect in a what-not-how
25 contract. And what-not-how contracts are discernible and

1 are justiciable.

2 I know you've seen this one, Your Honor.
3 Mr. Baker covered it. But in Task Order 139, now we're
4 going forward at 2008. Time matters. Conditions change.
5 The base sizes change. There are differences going on on
6 the ground. It's not a one-size-fits-all contract. The
7 contract continues to adjust as the contractor and the
8 military adjust the standards that apply to KBR. But
9 whatever standards are in place, Your Honor, we don't
10 second guess, KBR can't second guess and Your Honor can't
11 second guess. They're set forth in black and white and
12 they are contained in the evidence in this case. It sets
13 both performance standards and performance objectives,
14 Your Honor.

15 This is 139, Your Honor. Your Honor has seen
16 the contracts and I'm not going to walk you through every
17 one of them again. But I will point out that one of the
18 things that you'll see is that these contracts contain not
19 just these initial portions, but we talked about the
20 reference documents contained in the contracts.

21 And you heard the testimony that I referenced
22 earlier from Mr. Walsh that said, yeah, if you include a
23 reference document, environmental standard and SOP those
24 are terms and conditions in the contract. Those do need
25 to be applied. They are enforceable. And one of the SOPs

1 that we see is the Multi-National Corps SOP that
2 specifically relate to if you have a burn pit. Okay. And
3 this is -- it's a military SOP which is now being
4 incorporated into the contract document. So when the
5 military has a burn pit, it says only wood and wooden
6 products, paper and paper products or canvas uniforms will
7 be accepted.

8 So the military when it's running its own burn
9 pits, it has standards on what goes -- what kind of
10 materials can go in them and they elected as a decision of
11 sensitive military judgment to include that SOP as a
12 mandatory term of the contract that applied to KBR.

13 THE COURT: It applied everywhere, didn't it?

14 MR. LEDLIE: It applied -- in this instance, it
15 did because we see it in -- it's a military SOP which has
16 now been included as a reference in the contract. So it
17 applied -- you're right.

18 THE COURT: I understand. But this same
19 contract language would be included in a contract for
20 similar work at a sleepy base in the middle of the
21 California desert with no battlefield activities going on.
22 Right?

23 MR. LEDLIE: Absolutely not, Your Honor. This
24 is a Multi-National Corps Iraq SOP. This isn't a
25 California SOP.

1 THE COURT: Well, don't they have the same SOP's
2 applying elsewhere?

3 MR. LEDLIE: In California, Your Honor, I don't
4 think you could run a burn pit anywhere.

5 THE COURT: I'll stipulate to that.

6 MR. LEDLIE: Once again though, if you're going
7 to be doing this, you know, there's a process, there's a
8 procedure. You have to respect the contract process. You
9 can't second guess it. You can't say I don't think they
10 should have agreed to that. That doesn't seem like what I
11 would have written if I was the contracting officer. Your
12 Honor isn't the contracting officer and you have to
13 respect the sensitive military judgment that they made in
14 determining what was feasible for KBR and which KBR needed
15 to seek relief from if they didn't find it feasible
16 themselves.

17 So Mr. Baker did a far more robust job than I
18 have, Your Honor, on the contracts. But Your Honor has
19 heard the evidence. You understand that there are
20 discreet and discernible standards in those contracts.
21 They're not one-size-fits-all. They were specific to
22 Iraq. They were included. Over time, they did change.
23 But they never permitted the unfettered use of burn pits
24 to burn anything and everything. It just simply wasn't
25 what KBR's obligations ever were. And the record is clear

1 on that.

2 And whether KBR could use a burn pit or what or
3 how they were permitted to use the burn pit or the terms
4 and conditions that applied to waste management are not
5 judgments that this court can second guess.

6 Authorizations to use burn pits, there were
7 some. We produced to Your Honor every one that we could
8 find and KBR did not come back with any additional ones
9 that I'm aware of. If they did, they are what they are.
10 We don't question the wisdom of a contract officer if he
11 did grant KBR permission to use a burn pit at a given base
12 at a given time.

13 If they followed the standards that were also
14 required in that contract with respect to that use, then,
15 Your Honor, at the appropriate merits phase, we'll have a
16 problem because we don't second guess any military
17 judgments that were set down through the contracting
18 process. But any suggestion that there was a blanket
19 across the board, all base, all time, all products, Your
20 Honor, it simply doesn't match the evidence in this case.
21 And we can't second guess the contracts and we can't
22 second guess the contracting process. The contract
23 documents present ascertainable standards that do not
24 implicate the political question doctrine.

25 Before I move on, Your Honor, does the court

1 have any questions for me about -- well, let me do one
2 thing before I -- interrupt me as you will, Your Honor.
3 But I would like to pull up a slide of -- a demonstrative
4 slide, Your Honor, of a KBR burn pit and we're going to
5 look -- and this is based primarily on Mr. Robbins'
6 testimony. That he is represented here with a red hat.
7 He was overseeing the burn pit where he was stationed. He
8 had some third country nationals, TCNs, that were assigned
9 that he was supervising doing the operations.

10 Your Honor, this is the complete contrast to
11 what we saw in Carmichael. Inside this burn pit, we don't
12 see a permanent presence of a military officer giving
13 these third country nationals or Mr. Robbins' daily
14 instructions on exactly how to handle waste at that site.
15 That's not the way the process worked. This was KBR's
16 site for KBR to manage their employees.

17 If you had and you'll see on the slide, Your
18 Honor. I have DCMA up here. If DCMA and ACO came out or
19 a QAR came out for an inspection for five to ten minutes
20 or half hour, they might go into the burn pit. They would
21 be observing what was going on, but they would not be
22 directly supervising or giving instructions to the
23 personnel. They would go back to KBR management and if
24 they had issues, they would make them known. It was up to
25 KBR to deal with them, Your Honor. It's not -- it's just

1 not Carmichael. It's not direct and plenary. It's
2 contract management.

3 And while DCMA had the true ability, the
4 contract officers to direct a contractor, to the extent
5 that there were any CORs or any coders or the other terms
6 that you've heard, Your Honor, those people could not even
7 give any instructions to modify or direct the contractor
8 on anything. They were simply there to serve as the eyes
9 and ears of DCMA to provide input. But they didn't have
10 the ability -- they certainly didn't have direct and
11 plenary control over KBR's personnel in the way that you
12 see in the convoy situation. It's completely different.
13 Operational control of that site was granted to KBR to
14 perform their duties as tasked in the contract. Night and
15 day difference, Your Honor.

16 DCMA performs contract administration. But does
17 not directly control contractor employees or dictate how
18 KBR meets its performance standards. In the convoy case,
19 the convoy commander does dictate exactly how that convoy
20 operation is going to work from when it starts to when it
21 ends. And he communicates through a KBR personnel, true.
22 But he is the one in charge of that pit. At this pit,
23 Your Honor, Mr. Robbins was in charge and he was
24 supervised by his KBR management. The military if they
25 showed up for a surveillance audit, was there for a short

1 while. Did not give him any instructions or directions.
2 They looked at what was going on. Maybe exchanged some
3 pleasantries. And if they had issues, they would have
4 reported back to KBR's management. That's not direct and
5 plenary control, Your Honor. With that said, Your Honor,
6 does Your Honor have any questions?

7 THE COURT: No. I think you very adequately
8 covered it.

9 MR. LEDLIE: Thank you, Your Honor.

10 THE COURT: Thank you.

11 MR. LEDLIE: while I'm doing that, Your Honor,
12 to the extent that I'm drawing anything on there, does it
13 help Your Honor at all or are you looking mainly at the
14 paper document?

15 THE COURT: You mean if you are drawing on the
16 screen right now?

17 MR. LEDLIE: Yeah. I was.

18 THE COURT: Go ahead. That's fine. I'll look
19 at it.

20 MR. LEDLIE: I didn't know which version Your
21 Honor was looking at I guess.

22 THE COURT: Well, of that document that's up
23 there?

24 MR. LEDLIE: No. It's fine, Your Honor.

25 THE COURT: No. If you want to put something on

1 the overhead thing and mark it up or you can do it on the
2 screen, too. That's fine. We are a hi-tech courtroom.
3 You can do it any way you want.

4 MR. LEDLIE: I appreciate it.

5 THE COURT: You can do low-tech on that thing on
6 the right and hi-tech on the screen.

7 MR. LEDLIE: So to speak more to this, Your
8 Honor, though, there was an absence of plenary or direct
9 control that was the very structure of the LOGCAP's
10 contract as to functions within a FOB. Functions within a
11 FOB, KBR was fully responsible for performing the function
12 or capability. That's from Exhibit 38, Your Honor.

13 And KBR did maintain supervisory control over
14 all contractor personnel. Task Order 59, Exhibit 76.

15 Exclusive supervisory authority and supervision
16 over their employees. Contrast that to Carmichael, Your
17 Honor. Contrast that to direct and plenary control. It's
18 not. The relationship of KBR and the U.S. Army was at all
19 times to be that of an independent contractor.

20 Your Honor is familiar with independent
21 contractors and that you can set a standard in a contract
22 and ask that contractor to go out and perform it. But you
23 don't have the authority to go and interfere with how he's
24 doing that. You manage a contractor through whether or
25 not he meets the terms and conditions and you change it

1 with his agreement through accepted contracting
2 principles. That's not Carmichael.

3 In fact, contractors not in a convoy because in
4 a convoy situation, Your Honor, as the LOGCAP contract
5 recognizes, contractors are not lawyers. They are not
6 equipped to deal with the threats that are engaged on a
7 route in insecure areas. In those areas, they have to
8 rely on the military. In fact to reserve their Geneva
9 Convention status and everything else, they can't protect
10 themselves in that way other than self-protection. They
11 can't actively engage the enemy. They have to rely on the
12 military. But once they get on the base within their
13 area, they are given operational control over that site
14 and they're expected to be self-sufficient --

15 THE COURT: well, they are relying upon the
16 military for their safety and security, aren't they?

17 MR. LEDLIE: Your Honor, they do rely on the
18 military for the security of the base itself. And
19 certainly, if they came under mortar attack and the base
20 commander came out and said, you know what, I want you to
21 shut down the burn pit for now, go back to your -- go back
22 over here with my guys, they would have to listen to that.
23 Absolutely, Your Honor.

24 But in their day to day, 6 to 6 or 7 to 7,
25 outside of an unusual circumstance, as General Vines

1 himself said, I'm not going to direct a contractor in the
2 performance of their work. We don't do that. We rely on
3 the contracting professionals -- we rely on KBR to manage
4 their employees. And if there's an issue that needs to be
5 brought up otherwise, we rely on the contracting process.
6 That's the way the military works in wartime with
7 contractors because contractors are not direct reports to
8 the base commander. They work for KBR. They are not
9 expected to take individualized authoritative direction
10 from military officers. In fact, it's prohibited by every
11 standard of contracting law. Because if we did that, Your
12 Honor, we would be converting to be a government employee.
13 There's a large number of problems with that. There would
14 be employment law issues. There's a lot of reasons why we
15 don't allow that, Your Honor.

16 The army has worked with the LOGCAP program for
17 a long time. They understand that. The commanders
18 understand that. The commanders that came here spoke to
19 their understanding that contractors are different. We
20 didn't treat them as soldiers. We didn't give them direct
21 supervision. We didn't give them orders. We relied on
22 their people to manage their folks and we relied on the
23 contracting -- we would plan with their management. We
24 would tell them what's going on. But that doesn't
25 constitute plenary or direct control. That constitutes

1 helping the contractor know what he's expected to do. But
2 how to do that on a day to day basis, that's for the
3 contractor to manage once he knows what's coming.

4 In fact, we don't tell the LOGCAP contractor how
5 to perform the mission. We just tell them what the end
6 result has to be. Exhibit 8. It's the absence of direct
7 or plenary control. The initial objective is to require
8 the contractor to be as self-sufficient as practical in
9 the wartime location.

10 And on most FOBs on most days as you heard from
11 the witnesses on the stand, the military was not all up in
12 KBR's business at the actual job site. And if they were
13 there, they still respected the fact that KBR's personnel
14 worked for KBR and not for them. KBR's subcontractors
15 they wouldn't really deal with at all. They'd go back to
16 KBR's management if they had an issue and that's a
17 critical distinction between direct control and
18 contractual control. One creates a political question.
19 One does not. This is the latter.

20 We'll move on, Your Honor, to the combatant
21 activities exception questions on remand. Unless Your
22 Honor has any other questions on --

23 THE COURT: No. That's fine. That's fine.
24 Thank you.

25 MR. LEDLIE: The first question, Your Honor,

1 that you have phrased to us is whether -- or the Fourth
2 Circuit did -- whether the military retained command
3 authority over KBR's waste and water services. Put
4 another way, the extent to which KBR was integrated into
5 the military chain of command.

6 And there has been a suggestion that this
7 created -- that we're suggesting that there's a per se
8 rule that because the LOGCAP contract said maintain an
9 independent contractor status, that this test could never
10 be satisfied in the LOGCAP situation. We know that's not
11 true.

12 In the Carmichael situation, they were over
13 there on a LOGCAP contract. But they were in a very
14 specific mission at that time, a convoy, a military
15 convoy, a heavy militarized convoy. And under the
16 contract, that fell under a special clause, force
17 protection and there was an unusual arrangement for that
18 limited purpose. But on side the base, you don't see that
19 regularly day to day.

20 Yes, like I said, insurgents are storming the
21 fence. Military is going to come in and they're going to
22 take control of that situation for the safety of everybody
23 on that base. But the contractor on a day-to-day base
24 inside the site, they do not integrate into the military
25 chain of command. The military has used them as a force

1 multiplier. They've moved those soldiers that might have
2 been performing waste disposal previously for the military
3 out. They're not there anymore. The contractor personnel
4 and the contractor management are there. They've taken
5 over.

6 But it's not true that in all situations,
7 contractors remain independent of the military. Sometimes
8 the military doesn't follow that rule. And you have to
9 look at Saleh as an example of a contractor that had lost
10 its status. The contractor personnel had lost their
11 status as independent contractor personnel. They were
12 being treated and they were assigned to work inside of a
13 military chain of command.

14 More specifically, the contractor employees were
15 actually teamed with military personnel who the military
16 personnel were themselves performing the specific task at
17 issue.

18 Interrogation. So you have a military soldier
19 and an interpreter in a room together with a detainee
20 working as a team. In this situation, they ultimately are
21 answering up to a military commander who has control of
22 the overall interrogation process. So the sergeant and
23 the contractor work as a team. And who sets that team's
24 performance? who is looking over them? A military
25 officer. That is what integration into a combatant

1 activity over which the military retains command authority
2 looks like. They're actually assigned to a military unit
3 and they're doing a job side by side with the soldier and
4 they're answering to a military commander who is giving
5 them authoritative direction. It can happen. It did
6 happen. But that's not what we have here.

7 The overall supervisor of the burn pit, if it
8 was a KBR burn pit was somebody like Mr. Robbins. His
9 immediate supervisor was another KBR management person.
10 His ultimate supervisor was KBR management. As you go up
11 the KBR chain of command, you hit KBR, KBR, KBR.

12 In Saleh, you didn't have that. You had a
13 soldier and a contractor working together as a team, but
14 their work is being overseen by a superior military
15 officer and he's the one that decides what they're going
16 to do next, what they need to do different. It's
17 completely different, Your Honor.

18 So the function of that is are they part of a
19 military unit? A command is a military unit. You have
20 command authority over the personnel in a unit. If you
21 take a contractor and you put them inside of a military
22 unit and you put them as functionally the equivalent of a
23 soldier, you have a problem if you're a plaintiff because
24 you're going to run flat into the combatant activity
25 exception. But that's not what we have here.

1 But it's not so clear and it's not so simple.
2 In Al Shimari, Your Honor, the military -- this was at Abu
3 Gharib prison. And the military was unquestionably in
4 charge of the official command structure at Abu Gharib for
5 interrogations. The military was short on interrogators
6 and they brought in some interrogator contractors and
7 these folks were assigned to the military command
8 structure at Abu Gharib and they actually had to submit
9 their interrogation plans to the military chain of command
10 for approval. That's direct control, but it's also
11 integration into a combatant activity over which the
12 military is definitely exercising command authority. They
13 are approving or disapproving the specific plans. And
14 they were actually once again interrogated -- I'm sorry --
15 integrated into interrogation teams under direct military
16 command. It's completely different than what we see at
17 the burn pit.

18 But the court found that even though the
19 military had command of the prison and even though the
20 interrogator personnel were required to submit these plans
21 and there were some guidance documents that they were
22 supposed to follow and there was military officers looking
23 over them during the day, that at night, the military
24 wasn't -- there was a command vacuum. They were not
25 actually on the ground providing plenary or direct control

1 or in this case integrating them into the command
2 structure at all times because the command structure
3 wasn't operating very well at all times.

4 And in those circumstances, Your Honor, the
5 formal control that existed, even though they were
6 integrated into a true military chain of command was not
7 sufficient to create the need to trigger the combatant
8 activities exception because as a practical measure, you
9 look at what actually happened at the site when the events
10 at issue were happening. And here they said there was a
11 formal structure, there was formal integration. But at
12 night, there wasn't any commanders looking over this. And
13 therefore, there was not actual control.

14 So Your Honor asked about formal versus actual
15 control. This pattern of facts is very helpful to the
16 plaintiffs, Your Honor. But we don't even get there. We
17 don't even get there, Your Honor, because KBR was not
18 integrated into a military unit doing waste disposal.
19 They were the unit. They were the civilian unit. So
20 combatant activities, Your Honor, on which KBR bears the
21 burden. But we see, Your Honor, there's at least a
22 genuine issue of material fact. Far more than that, Your
23 Honor, it simply doesn't match the facts of this case.

24 Both in practice and in policy, that's made
25 clear that there is an absence of command authority in the

1 waste and water issues here.

2 I believe I made this point before, Your Honor,
3 but I want to make sure that it's clear. When you do your
4 discerning analysis of combatant activities exception and
5 it speaks about a common mission, the mission is specific.
6 It's not war. It's what's the task at hand. In this
7 case, it was interrogations. In our case, it's waste
8 management and water services at those bases where KBR is
9 the one doing it.

10 And so you can be integrated into the planning,
11 into the overall mission. That's not the test. If you're
12 going to do a discerning analysis -- a discriminating
13 analysis, you're going to look at the cases fairly. You
14 find that you have to look at what's actually going on on
15 the ground. And when you do that, Your Honor, it's not --
16 it's just not the case that the military was exercising
17 command authority. They are exercising contractual
18 authority and there's a difference and every witness,
19 every general, every person said that. Not only did they
20 say that, the documents say that.

21 Contractors on the Battlefield, a reference
22 doctrine included in the LOGCAP contract. It must be
23 clearly understood that commanders do not have direct
24 control over contractor employees. It couldn't be more
25 clear. Contractor employees are not government employees.

1 Only contractors directly manage and supervise their
2 employees. Only contractors, Your Honor. The
3 relationship is -- it goes on to state, the relationship
4 with the contractor does not extend through the contractor
5 supervisor to his employees. Only the contractor can
6 directly supervise its employees.

7 This is consistent with the holding in Harris.
8 The scope of preemption that includes contractors'
9 contractual violations is too broad to fit this preemption
10 because the conduct underlying these violations is
11 necessarily made independently of the military's
12 battlefield conduct and decisions. This is the contracts
13 case. This is governed by the contract and that contract
14 was managed through the contracting management arm of the
15 military that set forth terms and conditions. By
16 definition, the military cannot retain command authority
17 nor operational control over contractors working on
18 performance-based contracts that describe the work in
19 terms of the required results rather than how the work is
20 to be accomplished.

21 Harris like this case was a performance-based
22 contract in which the independent contractor status of the
23 contractor was honored not just in the contract documents,
24 but in the field on the ground.

25 Among the witnesses that confirmed this was

1 General Vines. He said when asked the question, The
2 civilian contractors are not subject to your military
3 command and control through a chain of command. Correct?

4 That is correct.

5 And do you agree that during your time in Iraq
6 that contractor employees are not under the direct
7 supervision of military personnel in your chain of
8 command?

9 That is correct.

10 We didn't just ask them are they military -- are
11 they part of the military chain of command. We asked them
12 the other question. Are they under the direct supervision
13 of military personnel in your chain of command?

14 He said no, that is correct.

15 You agree that command and control of a civilian
16 contractor like KBR is tied to the terms and conditions of
17 the government contract?

18 General Vines agreed.

19 And that, meaning the terms and conditions of
20 the government contract is the exclusive measure of
21 command and control of the contractor as an entity?

22 I agree with that.

23 I believe we've covered this, but I want to make
24 sure I've got it a hundred percent correct, sir. Were KBR
25 employees integrated into the official command authority

1 of Multi-National Corps Iraq? They were not.

2 We didn't just ask the combat commander. We
3 asked DCMA. Are you just exercising contract management
4 or have you put these KBR personnel into your chain of
5 command? Augusta Fehn said no. She wasn't the only one.

6 Colonel Steven Zamparelli, DCMA commander, 2003
7 to 2004. So was KBR responsible under the LOGCAP for
8 supervising its employees?

9 Yes.

10 And was KBR responsible for supervising its
11 subcontractors?

12 Yes.

13 And were KBR employees ever part of the
14 military's chain of command?

15 No.

16 And were KBR's subcontractors ever part of the
17 military chain of command?

18 No.

19 And would a contractor employee become
20 integrated into an assigned unit and rotate in and out of
21 theater with the unit, a military unit?

22 Not to my knowledge. Not by direction of the
23 government, to my knowledge.

24 That's not the way that LOGCAP contractors were
25 treated. That's because the LOGCAP is not a personal

1 services contract. The military can't enter into
2 arrangements with civilians where they will take
3 personnel, civilian personnel who take day-to-day
4 direction from the military. But it's a particular kind
5 of contract, a personal services contract which under the
6 FAR, the LOGCAP is not. The LOGCAP is a services contract
7 that by the Federal Acquisition Regulations is required to
8 adhere to a performance standard system as opposed to a
9 personal services. And the reference to that, Your Honor,
10 is Exhibit 40, LOGCAP 101 and Operational Planners Guide.

11 A lot of witnesses, Your Honor, were deposed in
12 this case and in our brief, which you know is evidence in
13 this case, everything that's cited therein. I don't have
14 time to chapter and verse, go through every point that KBR
15 made in their three-hour presentation. I don't need to,
16 Your Honor, because the evidence is in our brief.

17 And I'm pointing you to some of it now, but you
18 need to look if you have any questions, just as you've
19 been clear to me that you were with KBR, that if there's
20 more to look at, you're happy to look at it. Your Honor,
21 at the end of this presentation, I'm going to go through
22 on various points and help direct Your Honor in our brief
23 to the various paragraphs that might be helpful to Your
24 Honor in sorting this out.

25 But Mr. Steinbugl, Colonel Steinbugl. Now under

1 the LOGCAP, was KBR responsible for supervising its
2 employees?

3 Yes.

4 Was KBR responsible for training its employees?

5 Yes.

6 Was KBR also responsible for supervising
7 subcontractors of KBR?

8 Yes.

9 That's echoed by Mr. Charlie Williams. KBR was
10 responsible for supervising its own employees?

11 Yes.

12 And was KBR responsible for supervising its
13 contractors? Well, for managing.

14 Yes. For managing its contractors and for
15 training.

16 And when you say provide supervision, does KBR
17 supervise its own employees?

18 Gerald Vincent said yes.

19 Colonel Walsh who we spoke of earlier. As DCMA
20 commander, could you directly discipline the KBR employee?

21 No.

22 The KBR subcontractor, could you discipline
23 them?

24 No.

25 Did you personally evaluate or sign off on any

1 particular employees -- KBR employees' performance of
2 their job duties under the LOGCAP III?

3 No.

4 If KBR was integrated into the military chain of
5 command of DCMA, which is a military command, Your Honor,
6 but he would be as we saw in the Saleh case and in the Al
7 Shimari case, looking at the performance of an individual
8 contractor and weighing in on that. That's not the way
9 LOGCAP worked.

10 Did KBR -- Mr. Singleton. Not just military
11 witnesses. KBR's own witnesses. Did anybody from KBR
12 report directly to DCMA as their supervisor?

13 No. Nobody.

14 Did DCMA conduct training for any KBR employees?
15 No.

16 And I think we've already established that DCMA
17 didn't have the ability to fire any KBR employees. Is
18 that correct?

19 Yes.

20 This is an independent contractor, Your Honor.
21 This is what it looks like. DCMA relied primarily on KBR
22 to perform quality assurance and inspections. DCMA had
23 limited personnel in theater. That's not being critical.
24 That's pointing out that the control that was exercised
25 over KBR was not as KBR has suggested to this court.

1 There were limited amount of personnel. There
2 were major -- as is identified in our brief, there were
3 major problems with the contract supervision system. But
4 as in Al Shimari, that's simply pointing out that on the
5 ground, things were not as robust as the formal system
6 might suggest. But that's okay. That doesn't create a
7 combatant activities exception. Far from it.

8 Although DCMA was delegated contract
9 administration authority for LOGCAP, DCMA in fact relied
10 on the prime contractor, KBR, to perform quality assurance
11 inspections and repair in those facilities.

12 So we have a report here from the Inspector
13 General and he's obviously not speaking specific to burn
14 pits here, Your Honor. I want to be clear about that.
15 This is Exhibit 52. But this is the way the entire LOGCAP
16 program was set up. KBR was directly responsible for
17 making sure that it met the performance standards. It was
18 a requirement of the contract that they do that.

19 The standards are clear. The lack of
20 conformance with them will be proven in this case, Your
21 Honor, and it has been through the witnesses that have
22 been allowed to testify that have been deposed so far.

23 And I'm not going to belabor this point. It's
24 in our brief, Your Honor. But the CORs, the suggestion
25 that the CORs were a meaningful and robust surveillance of

1 the program, the CORs in theater did not adequately
2 monitor the contractor's performance. That was the
3 finding, Exhibit 70 of the D.O.D. I.G. report. LOGCAP
4 Civil Augmentation Program Support contract needs to
5 comply with the acquisition rules.

6 The oversight of the LOGCAP support contract was
7 inadequate. Not being critical of the military. That
8 only comes into play if under a theory that the military
9 was itself negligent.

10 And I should address, Your Honor, briefly
11 although as we pointed out, it really wasn't teed up for
12 this hearing. But as to both Al Shimari Factor 2 and
13 Taylor Factor 2, Your Honor -- I have to help my
14 colleague, Ms. Veldman, unless she already knows where I'm
15 going here because I do have a slide. Second to the last
16 I think.

17 Under Taylor Factor 2, the National Defense
18 Interest factor which Al Shimari merely mirrors, Your
19 Honor. Whether the plaintiffs' claims or KBR's defenses
20 require the court to question the military's judgments, it
21 isn't ripe. So the court can't determine that yet. KBR
22 has not, because of their jurisdictional motion, filed an
23 answer, alleged whatever their allegations are going to be
24 as to what defenses apply. The court hasn't allowed
25 discovery in those areas.

1 Plaintiffs have asserted that Delaware law --
2 that the determination of this issue has to turn on a
3 choice of law analysis. Plaintiffs have contended as a
4 general proposition that Delaware law applies to their
5 tort base claims. And under Delaware law, the
6 contributory fault defense is not allowed with respect to
7 non-parties. The United States government is not a party
8 to this action and Delaware law does not allow comparative
9 fault where the defendant's conduct is reckless which is
10 another of plaintiffs' allegations. Similarly, Delaware
11 uses pure joint and several liability and KBR's defenses
12 do not apply to plaintiffs' contract claims in any event.

13 So that is an issue for another day, Your Honor.
14 But we did want to address it since Your Honor had asked
15 about it. We do think that that needs a far more robust
16 record before Your Honor could take that up. But that's
17 the answer to your questions there, Your Honor.

18 Going back to -- really this speaks to both lack
19 of direct or plenary control as well as lack of command
20 authority. General Sanchez was quite clear that
21 individual military officials could not direct individual
22 contractor personnel. He said that in this court as did
23 General Vines. I did not have command authority over
24 KBR's employees.

25 I asked him, KBR's command and control is

1 exercised through contract management, not command?

2 That is correct.

3 And the DCMA is a military organization?

4 They are, sir.

5 But through your declaration, I just want to
6 make clear that your command as the military commander,
7 you had command and control over your forces, your, the
8 forces assigned to you?

9 That is correct.

10 But you did not have command and control over
11 KBR's employees?

12 That is correct.

13 Similarly, the contracting arm, Your Honor.
14 General Radin. KBR was not in the military contracting
15 chain of command. He's a two-star general, Commander of
16 U.S. Sustainment Command in charge of overseeing the
17 LOGCAP contract.

18 Did you have command and control authority over
19 KBR employees?

20 No.

21 As a two-star general commander of the United
22 States Sustainment Command in charge of overseeing the
23 LOGCAP III contract for funding and management, did you
24 possess, command and control authority over KBR's
25 subcontracted employees?

1 No.

2 KBR was not in DCMA's chain of command. Wes
3 Bennett said it perhaps most succinctly. He was asked by
4 KBR, Did you also provide oversight of the KBR employees
5 to the extent they were providing a service that you
6 authorized?

7 His answer: I don't think my oversight was
8 specific to employees. It was more general to the
9 performance of the contractor. That's what contracting
10 personnel looked for. Performance of the contract.

11 Within that structure, did you provide
12 supervision or guidance to KBR as an entity which
13 necessarily includes KBR's employees? So now he's gone
14 from the specific of personnel to the entity.

15 And he says I wouldn't call anything I did
16 supervision. I would call it -- I wouldn't categorize it
17 that way. No.

18 I thought it was important for Your Honor to see
19 the video of Augusta Fehn because she explained exactly
20 how the contract management process worked in theater.
21 She was there in 2009. The LOGCAP had been going on for
22 quite a while and she was clear that the LOGCAP III was a
23 performance-based contract. The government control over
24 contractors is based in contract and based in DCMA
25 management. It's not commander authority. In order to be

1 legal, any contract administration must come through the
2 DCMA side of the military, Your Honor.

3 No one except the ACO, so CORs, mayors can
4 expressly direct a contractor to do anything. I read Your
5 Honor the core regulations on Friday and you have that in
6 our brief as well. The reason behind the policy
7 precluding combat commanders from telling contractors what
8 to do is to protect the public fisc. The contract agency
9 is the one that is responsible for answering where the
10 dollars go and what was done. It's important that the
11 system is -- has integrity, that the system has
12 accountability and that's the reason that the military has
13 one clear chain of command for contracting issues. And
14 they understand that they are to exercise contract
15 management, not to convert these people into soldier
16 equivalents and exercise command authority. These are
17 contracting professionals. They know how to manage a
18 contract.

19 One last point, Your Honor, in case you missed
20 it in her testimony. She said on lines 132, 10 through 13
21 and 136, 6 through 11, specifically, KBR was not
22 integrated into the command structure of the military and
23 KBR was not part of the military or DCMA chain of command.

24 There's no way that KBR can prevail on their
25 combatant activities exception with those types of facts

1 in this record.

2 The contractor, she also spoke to the citing
3 issue, Your Honor. We've told Your Honor that, yes, with
4 the operational military, you asked whether they have
5 control over a base and they do make certain decisions,
6 but they also rely on contractors, subject matter experts
7 to provide them with recommendations to let them know if
8 something is going on there is going to create a hazard.

9 Mr. Walsh, I provided Your Honor with that
10 testimony on Friday. He said absolutely that's something
11 they would be expected to do. I'm not aware of them ever
12 doing that. Ms. Fehn said look, I'm aware of them maybe
13 complaining about something like that. We'd listen to
14 them and we'd accommodate them. That's the testimony.

15 So a subject matter expert, somebody that's an
16 expert in their field knows the conditions, knows risks,
17 they are in a better position as Ms. Fehn explained
18 because the folks, the war fighters, there's not an MOS in
19 today's military, Your Honor, for municipal waste
20 management. There is a broad function that our core of
21 engineers personnel could handle, but we don't have
22 enough. We do rely on contractors, but we rely on them to
23 help out our other military and let them know if there is
24 something that they need to be aware of.

25 She's also very clear about how you dictate

1 tasks. The military does not give step by step direction
2 in these types of matters. They don't put them under
3 their direct and plenary control. Rather this is an end
4 product we want, go get it done. You should know how.

5 Even Commander Hersh, who I don't think it's any
6 accident, Your Honor, that KBR would probably be able to
7 identify the most gung-ho QAR in history and Mr. Hersch
8 gave some very spirited testimony here and I appreciate
9 that and I'm sure that they were well familiar with him
10 from his time there.

11 But he knew his role. His role was not to give
12 KBR employees instruction, guidance or direct orders. As
13 gung-ho as he was, he understood there's a contract
14 process. It has to be respected. We can't question that,
15 KBR can't question that and this court can't question that
16 because the integrity of the independent contractor status
17 of KBR in these functions was maintained.

18 He never saw anyone actually operating the burn
19 pit. He only went out once a week. There was a good
20 reason why he only went out once a week. But the fact
21 remains, to suggest that these folks were under any type
22 of direct and plenary control when the only person out
23 there to monitor their performance never even sees anybody
24 doing the job is interesting.

25 And he admits that he never gave KBR the

1 authority to ignore the hazardous waste procedures. Nor
2 did he have the authority to do so. He confirmed that
3 these military bases had HAZMAT areas and that's where
4 that type of waste was supposed to go.

5 Mike Mayo, KBR's witness, he agrees that the
6 relationship between the military and KBR was defined by
7 the contract. He agreed that military commanders did not
8 have the authority to bypass the process. Everybody
9 understood there's a formal process. KBR understood it.
10 The military understood it. The court needs to respect
11 that that was the process.

12 He agrees that military commanders, members of
13 the supported unit and LOGCAP support officers did not
14 have the authority to direct KBR's work or give KBR
15 orders.

16 He agrees that the majority of KBR's work force
17 was subcontractors and that KBR, not the military, was
18 responsible for the supervision of those subcontractors
19 and the military could not issue orders to KBR
20 subcontractors. And he does not, by the way, have any
21 specific recollection of any burn pits and never had the
22 issue of waste management come to his attention. So if
23 you're giving a discriminating analysis, that's a fact to
24 consider.

25 Roger Singleton. Another witness we heard from,

1 another witness that agrees that KBR had to follow the
2 terms of the contract. And conversely, KBR could not do
3 anything outside the scope of the contract. That's KBR's
4 witness. He admits that the military wanted KBR to
5 perform a new task. They had to go through the
6 established LOGCAP process.

7 You keep seeing the same testimony again and
8 again. There's more examples of it in our brief, Your
9 Honor. But even from the record you just heard in court
10 this week or last week, excuse me, you can see that
11 there's no hidden command authority going on here. In
12 these tasks, on a day-to-day basis, across bases, across
13 two countries, KBR was managed as an independent
14 contractor unless urgent needs like convoys, like discreet
15 emergent conditions required the military to step in and
16 take a more active role for a limited duration. That
17 happened. But it didn't happen regularly and it
18 doesn't -- the fact that KBR traveled, Your Honor, there's
19 been a lot of testimony about convoys and the fact that at
20 times that KBR was under plenary control doesn't mean that
21 at all times they were under plenary control. You have to
22 give it the discriminating analysis.

23 He agrees that KBR was responsible for assuring
24 that their own performance was in compliance with the
25 contracts. He agreed that neither the supported -- I

1 already read that. He agreed that there were no military
2 personnel working with KBR in the burn pits. This isn't
3 Saleh. He agrees that no military commanders or military
4 security forces gave any instruction to KBR employees in
5 the burn pit as to how to do their job.

6 Your Honor, I understand that Your Honor has
7 some reticence about this case. I understand that you
8 think that the plaintiffs aren't allowed to go forward at
9 this juncture. Based on your questions, I think that's
10 the way that the court is leaning.

11 THE COURT: Don't assume anything from my
12 questions.

13 MR. LEDLIE: Okay. Well, Your Honor, I'm glad
14 to hear that because the operative law in this case only
15 gives the type of immunity that we're talking about or the
16 lack of justiciability for political question in a very,
17 very narrow context and the facts here just don't match
18 that. And combatant activities exception once again is
19 KBR's burden and the facts here suggest that they are
20 nowhere close to meeting it.

21 Mr. Robbins' testimony is quite clear that the
22 military was not commanding him nor regularly a presence
23 in his tenure at the burn pit.

24 Once again, if you're looking at combatant
25 activities exception, Your Honor, this is the picture.

1 You could pencil in a QAR coming by every once in a while
2 doing contract management, a contract officer maybe coming
3 by, a COR. But this is not -- that's not them taking
4 control of that burn pit and making that a military
5 command. That's them managing a contract and in the case
6 of the CORs and the mayors, it's really them just
7 surveilling it. If they actually wanted to change
8 anything, they, too, had to go back to the contract
9 officer and the contract management process, Your Honor.
10 I think I've made my point.

11 On combatant activities exception, Your Honor,
12 before we get to the summary slides here, does Your Honor
13 have any questions about the operations of KBR, the
14 interaction between military command structures and KBR
15 command structures, anything that I can -- any questions
16 that the court has that I can address?

17 THE COURT: No. I think the record is pretty
18 well developed on that.

19 MR. LEDLIE: Thank you, Your Honor.

20 THE COURT: Thank you.

21 MR. LEDLIE: So I know that the court has
22 indicated that he will not be ruling from the bench --

23 THE COURT: You got that one right.

24 MR. LEDLIE: And as a result, Your Honor, I
25 wanted to help direct the court to some areas that may

1 address certain topics that the court may be looking at
2 that demonstrate that KBR was not under either the plenary
3 or direct control of the military nor were they integrated
4 into a combatant activity waste management or water
5 services that the military retained command authority
6 over.

7 And some of the subpoints, Your Honor, is that
8 KBR was a private company and not part of any military
9 command. Paragraphs 1, 6 and 32 of our brief, Your Honor,
10 would be instructive on that point.

11 KBR was hired to be a force multiplier and in
12 that hiring was expected to free the military from the
13 need to be jointly operating those operations. Paragraph
14 3. It would be managed through a contract, but they would
15 not be cooperating.

16 KBR was hired for its subject matter expertise.
17 They were experts in the field and should know how to meet
18 the performance standards. Paragraph 9.

19 KBR at all times relative to this suit with
20 respect to waste and water was working under a
21 performance-based contract, Your Honor, as opposed to some
22 other arrangement like personal services. Paragraph 8.

23 KBR was expected to be self-sufficient.
24 Paragraph 4.

25 KBR was at all times an independent contractor

1 in the performance of their waste and water duties.

2 Paragraph 12. Also paragraph 12, operational control over
3 its task services, Your Honor.

4 KBR had exclusive supervisory authority and
5 responsibility over its employees and subcontractors.
6 Paragraph 13, Your Honor.

7 KBR was responsible for ensuring its performance
8 complied with the contract. Paragraph 16, Your Honor.

9 KBR performed its work independent of the
10 military. Paragraphs 13, 32, 33, 60 and 61, Your Honor.

11 KBR could decline work. Paragraph 11.

12 KBR employees maintained separate offices and
13 housing on bases. Paragraph 15, Your Honor.

14 KBR had its own management structure. That's
15 among other places at paragraph 15.

16 KBR was not in the military chain of command.
17 Paragraphs 20, 27 and 28, Your Honor.

18 KBR was not directed or overseen by the combat
19 command, the operational arm of the military. Paragraphs
20 19, 27, 28, 30 and 43, Your Honor.

21 KBR was not in the DCMA chain of command.
22 Paragraph 29.

23 And KBR only took direction from the contract
24 documents, from the contract officers and ACOs under the
25 standard operating procedure under established contracting

1 law. Paragraphs 19, 22, 26, 46 through 57 and 59, Your
2 Honor.

3 That's a bit of a roadmap to some of the
4 evidence which plaintiffs believe should guide you in your
5 determination of the issues in this case.

6 I would point out, Your Honor, one other point.
7 There's been a suggestion that things like recycling
8 weren't ever possible in Iraq. But you heard the
9 testimony from Mr. Postlewaite that when he was over
10 there, there was recycling programs at places. Composting
11 programs were employed early on.

12 I'd also show you, Your Honor, a document from
13 our brief. 6017. We'll do the cover page and then --
14 Your Honor, this is a KBR Department of Logistics Document
15 15 January 2005. Your Honor may remember it. You know,
16 of course, we did do discovery on Balad. This was one of
17 the Balad documents, Your Honor. I can just read it to
18 Your Honor. It's page 41 of Exhibit 6017, Your Honor.
19 And among other things, it notes that in 2005, KBR was in
20 the stages of construction of a compacting baling of metal
21 for disposal. You also heard testimony from other
22 witnesses about KBR separating out metal from the waste.
23 But also a composting and bio-remediation program for food
24 waste, Your Honor. This was feasible in the early stages
25 of the war and it was not employed and it should have been

1 under the contract.

2 My colleague, Mr. Baker, has pointed out rightly
3 that I haven't addressed Your Honor's water claims
4 question. Mr. Baker is more of the water expert than I.
5 Would you like to -- I'll handle it, Your Honor.

6 I believe we've covered this at length in our
7 brief. The water claims, there's no evidence of plenary
8 control. No evidence of integration. Your Honor has the
9 slide where we give you --

10 THE COURT: That's 54. I'm looking at it.

11 MR. LEDLIE: Is it 54, Gina?

12 THE COURT: I think it's 54. I've got it right
13 in front of me. Thank you.

14 MR. LEDLIE: Okay, Your Honor. We would
15 basically say, Your Honor, one of the things that you need
16 to look at in the water claim is while it does set a
17 performance standard just like in waste, that KBR was --
18 had the responsibility for testing and ensuring the
19 quality of the water it received. That was KBR's direct
20 responsibility.

21 The military did do some QA/QC. Water is
22 extremely important in theater. So they certainly did do
23 some testing on that. But not all the water was tested by
24 the military. In fact, KBR had the responsibility for
25 testing and ensuring the quality of the water it

1 delivered. Any preventative maintenance oversight was
2 limited to their -- to the end product, the deliverable,
3 not the process.

4 And there has been noted as Exhibit 114 an army
5 I.G. report that found that KBR was not living up to their
6 contractual obligations. There's no evidence that KBR was
7 ever directed or authorized to violate the performance
8 standards with respect to water services, Your Honor.

9 THE COURT: Was KBR responsible for the -- I
10 think I heard the witness correctly -- the reverse osmosis
11 canteens?

12 MR. LEDLIE: The reverse osmosis purification.
13 ROWPUS. Basically, yes. They would treat water, Your
14 Honor, at certain bases at certain times. And just as
15 with the burn pits, they didn't do all the water at all
16 bases. There weren't issues with all water at all bases.
17 But there were several documented incidents where there
18 was a problem and KBR was --

19 THE COURT: If I understood the testimony
20 correctly, the reverse osmosis water was not a popular
21 type of water among the soldiers and that's why we ended
22 up with a billion water bottles.

23 MR. LEDLIE: I did hear General Sanchez relate
24 that story. I believe that as time went on, Your Honor,
25 there actually came a time that they were treating the

1 water and then bottling it in country. So I think as in
2 all things in this case, you have to look at the direct
3 circumstances of the bases over time and it's not a
4 one-size-fits-all solution. But I do think that we heard
5 that testimony, Your Honor.

6 THE COURT: Okay.

7 MR. LEDLIE: If I could have a minute, Your
8 Honor, to confer with colleague?

9 THE COURT: Yes.

10 (Pause.)

11 MR. LEDLIE: There's also apparently with
12 respect to the water claim in our brief, Your Honor, a
13 D.O.D. report that also relates to that. We'll certainly
14 identify that in our post-hearing briefing to Your Honor
15 to assist you --

16 THE COURT: And you're going to give me some
17 extra slides that you didn't have?

18 MR. LEDLIE: Yes.

19 THE COURT: That's fine. That's fine. Okay.

20 MR. LEDLIE: Any questions that Your Honor has
21 for the plaintiffs?

22 THE COURT: No. I've tried not to be pesky
23 today. I mean, look, both sides have done an exhaustive
24 thorough presentation of your respective positions and I
25 admire both sides for the comprehensive presentations. So

1 it's because they were so comprehensive that I have not
2 that many questions.

3 MR. LEDLIE: Understood, Your Honor.

4 THE COURT: You've loaded me up with a lot. All
5 right. Are you finished now?

6 MR. LEDLIE: Yes, Your Honor.

7 THE COURT: Okay. What I'd like to do is --
8 does KBR want to have a brief rebuttal, very brief? No.
9 Not now. Just answer yes or no.

10 MR. MATTHEWS: No.

11 THE COURT: No. Okay. Well, if that's the
12 case -- because I was going to say if you wanted to have
13 ten minutes of rebuttal, I'd give it to you. But we have
14 to take a break first. But fine with me.

15 MR. MATTHEWS: Your Honor, all I was going to
16 say was that we think there are a number of things that
17 we'd like to address and clarify, but we think that the
18 ten-page submission is sufficient.

19 THE COURT: All right. Or you could just give
20 them the famous answer of General Anthony McAuliffe when
21 asked to surrender at the battle of the bulge. Nuts.

22 MR. MATTHEWS: As tempting as that is --

23 MR. LEDLIE: Plaintiffs adopt that, Your Honor.

24 MR. MATTHEWS: I did, Your Honor, if I can -- if
25 you'll indulge me just to express on behalf of the KBR

1 team here our appreciation for the extraordinary amount of
2 time and dedication that has been given to this matter.
3 The court's questions reflected an obvious comprehension
4 of the issues and the fact as we all -- all litigants
5 appreciate that the bench was paying attention and we very
6 much do appreciate that and --

7 THE COURT: As I said, don't assume anything
8 about my views from my questions. I'm just trying --

9 MR. MATTHEWS: I don't.

10 THE COURT: -- to get clarification about
11 things. I think this is the last time you all are going
12 to be in front of me. Am I correct?

13 MR. LEDLIE: We hope not, Your Honor.

14 THE COURT: Well, at least for a while. No. I
15 just wanted to say no MDL is a fun case that judges look
16 forward to and they're all very lengthy and complicated
17 and I've told them don't you ever send me one of these
18 cases again because not at my age do I want to take on a
19 new MDL. Hopefully, I can survive and outlive this MDL.

20 But no. It's been a pleasure to preside over
21 this case. The lawyering has been extraordinary. I
22 appreciate all that. While I've said you weren't always
23 good in the sandbox, you've been very professional and
24 done a great job advocating for your clients. So I really
25 appreciate it all.

1 MR. MATTHEWS: Thank you, Your Honor.

2 THE COURT: And now I have to take this matter
3 under advisement. I look forward to your brief memos.
4 Yes?

5 MR. BAKER: I apologize, Your Honor. One final
6 housekeeping matter and this will take thirty seconds. On
7 Friday, we handed up an exhibit list and a box of
8 documents. We were doing some QC over the weekend and we
9 discovered that the box wasn't exactly correct. So we've
10 culled back the box already. We have a new box for the
11 clerk and we have a new list and a --

12 THE COURT: Just make sure that KBR knows what
13 you're substituting.

14 MR. BAKER: We have given KBR our exhibit list
15 and our --

16 THE COURT: All right. That's fine. I assume
17 they would have been screaming if they didn't like what
18 you did. All right. Well, we now have the correct
19 exhibits and my law clerk and I have a lot of work to do
20 and so pray for us.

21 MR. LEDLIE: One last point, Your Honor. I do
22 owe you a couple of slides and we'll get them very
23 shortly.

24 THE COURT: And I've not been up here getting
25 distracted taking copious notes because I'm getting the

1 transcript of this. So every single citation you've given
2 me I will have chiseled in granite that Ms Bankins will
3 give me when she gets to it.

4 But again I appreciate very much your doing this
5 and we can get out of here before this place gets hit with
6 a blizzard. All right. well, thank you very much,
7 counsel.

8 (Proceedings concluded.)
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CERTIFICATE OF REPORTER

I, Lisa K. Bankins, an Official Court Reporter for the United States District Court for the District of Maryland, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the hearing in the case of the In Re: KBR, Inc., Burn Pit Litigation, Civil Action Number RWT-09-md-2083, in said court on the 13th day of March, 2017.

I further certify that the foregoing 198 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, together with the backup tape of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this 16th day of March, 2017.

Lisa K. Bankins

Lisa K. Bankins
Official Court Reporter

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